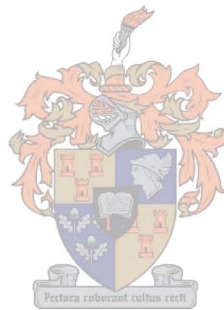


# THE JUDICIAL REGULATION OF STATE COMMERCIAL ACTIVITY

GEO QUINOT

DISSERTATION PRESENTED FOR THE DEGREE OF DOCTOR  
OF LAWS AT STELLENBOSCH UNIVERSITY



PROMOTOR: PROF AJ VAN DER WALT

CO-PROMOTOR: PROF GF LUBBE

DECEMBER 2007

## **Declaration**

I, the undersigned, hereby declare that the work contained in this dissertation is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

Signature: .....

Date: 05 November 2007

## **ABSTRACT**

The state participates in the market place in a large number of ways, spending millions annually. It buys and sells goods and services; it employs a massive workforce; it acquires, develops and disposes of land; it engages in all kinds of financial transactions; it sets up companies, holds shares and enters into partnerships. Yet, the legal treatment of the state as commercial player remains an enigma. In South African law there is no shortage of legal rules that apply or can potentially apply to state commercial activity, but there is nevertheless no coherent view of the conceptualisation of state commercial activity and as a result no clarity on how such conduct should be legally regulated. A voluminous, but extremely fragmented collection of statutory mechanisms aims to regulate a large variety of matters connected to state commercial activity. The courts have shown an almost schizophrenic attitude towards the application of the common law to these state actions, alternating between opting to apply general contract law and general administrative law rules.

Constitutional transformation in South Africa necessitates a critical reevaluation of the legal approach to the regulation of state commercial activity. This necessity flows from a number of factors that converge in the judicial regulation of state commercial activity. These factors include a shift in the nature and function of the state, including the judiciary under the new constitutional dispensation; the use of commercial conduct to advance important transformation goals; the proper relationship between courts in protecting fundamental societal values captured in the Constitution and the executive as the key driver of social change; and the role of law in this changing environment. An analysis of the judicial regulation of state commercial activity creates an opportunity to probe basic questions about legal methodology, particularly in a transformative context such as South Africa. A central theme in this reassessment is the role of dichotomous reasoning in legal methodology, based on sharp distinctions between monolithic concepts such as public/private, state/private enterprise,

rule/standard, contract/administrative action, delict/contract that no longer seem to adequately relate to experience in the real world.

An analysis of South African case law on state commercial activity reveals the underlying judicial premise that all such state action can be classified as either administrative or contractual in nature. Once this conceptual classification is done the rules that apply follow automatically. State commercial activity is consequently subjected to either administrative law or private law rules in a manner that denies or obfuscates the choice on the part of the individual judge. The criteria used to classify the nature of the action under the classification approach have varied over time. The most prominent criteria are the source of the power exercised and the presence of superior power, with the courts currently alternating between these two. However, these criteria cannot be formulated with certainty and they do not provide consistent guidelines. While the criteria identify important aspects of state commercial activity that merit increased judicial control, the relationships between the criteria and the ensuing substantive regulation and particularly the relationships between them remain nebulous.

Ultimately, the classification approach is characterised by excessive conceptualism and formalism. The reality that judges choose what regulation to apply to particular instances of state commercial activity is hidden. The application of specific substantive rules is made to seem natural, inevitable and selfevident. This closes off dialogue about that choice.

Two alternatives to the classification methodology exist in South African law, namely an exclusively private law approach and a comprehensive public law approach. The exclusively private law approach highlights the commercial nature of the state action to the effect that state contracting is treated on par with all other forms of (private) commercial activity. However, it is questionable whether private law regulation can adequately address the regulatory concerns specific to the public context of state conduct. An analysis of this alternative approach identifies promising private law doctrines that can inspire such regulation, but significant further development is required before the desired level of regulation will be feasible on private law grounds. The comprehensive public law approach insists on the consistent



application of public law rules to all state conduct, irrespective of the commercial nature of that conduct. Although this option may seem highly desirable, especially because it ensures public scrutiny of all state conduct, it is not ideal either. Particularly problematic is the high cost of such regulation and resultant inefficiency that may not be realistic given the current demands on South African public administration.

The German and French legal systems provide examples of a third alternative approach in the form of distinct legal figures that exist between contract and administrative law. Recognition of such a distinct figure provides the prospect of developing a separate set of regulation tailored to the specific needs of that figure. A separate branch of government contract or government commercial law can thus be created. In South African law it may be possible to stimulate such development by recognising state contracts as a separate class of contract. However, it is doubtful whether the development of a third regulatory category will encourage the integration of public and private law rules to overcome the conceptualism of the current approach; it could also reinforce conceptualism by adding a third conceptual category.

The most promising alternative methodology is premised on a more complex view of the interacting factors that inform judicial regulation and, by extension, legal treatment of state commercial activity. Such an approach perceives the distinctions between the various relevant concepts and factors not as sharp dichotomies, but as continuous and fluid relationships. It recognises that the legal treatment of a specific instance of state commercial activity is a function of the relationship between the various concepts and factors. Such an approach calls for more open and direct engagement with all the factors informing the regulation of state commercial activity. Ultimately, it requires individual judges to take responsibility for the choices they make in their involvement in state commercial activity by means of the regulatory control they exercise. It accordingly fosters dialogue and public debate about the role of law in social phenomena such as state commercial activity. This approach is in line with a culture of justification and transformative constitutionalism that ground the democratic enterprise in South Africa.

## OPSOMMING

Die staat neem op 'n groot aantal wyses deel aan die handelsverkeer en spandeer jaarliks miljoene. Dit koop en verkoop goedere en dienste; dit stel 'n massiewe werkerskorps in diens; dit bekom, ontwikkel en vervreem grond; dit sluit allerhande finansiële transaksies; dit rig maatskappye op, hou aandele en sluit vennootskappe. En tog bly die regsbeskouing van die staat as kommersiële speler 'n enigma. In die Suid-Afrikaanse reg is daar geen tekort aan regsreëls wat op kommersiële staatsoptrede van toepassing is of potensieel van toepassing kan wees nie, en tog is daar geen koherente benadering tot die konseptualisering van kommersiële staatsoptrede nie en gevolglik geen duidelikheid oor hoe sodanige optrede deur die reg gereguleer moet word nie. 'n Groot volume uiters gefragmenteerde statutêre meganismes poog om 'n verskeidenheid kwessies rakende kommersiële staatsoptrede te reguleer. Die howe toon 'n bykans skisofrene houding jeens die toepassing van gemeneregreëls op sodanige staatsoptrede en wissel tussen 'n keuse vir die toepassing van algemene kontraktereg en algemene administratiefreg.

Konstitusionele transformasie in Suid-Afrika noodsaak die kritiese herbeskouing van die regsbenadering tot die regulering van kommersiële staatsoptrede. Hierdie noodsaak vloei uit 'n aantal faktore wat ineenloop by die geregtelike regulering van kommersiële staatsoptrede. Sodanige faktore sluit in 'n verskuiwing in die aard en funksie van die staat, insluitende die regbank, onder die nuwe grondwetlike bedeling; die gebruik van kommersiële optrede om belangrike transformasie-oogmerke te bereik; die gepaste verhouding tussen die howe in hul beskerming van fundamentele gemeenskapswaardes in die Grondwet en die uitvoerende gesag as sentrale dryfkrag agter sosiale transformasie; en die rol van die reg in hierdie veranderende omgewing. 'n Analise van die geregtelike regulering van kommersiële staatsoptrede skep die geleentheid om basiese vrae rakende regsmetodologie aan te spreek, spesifiek in 'n transformatiewe konteks soos Suid-Afrika. 'n Sentrale tema in hierdie herbeskouing is die regsmetodologiese rol van digomatiese of tweesydige redenering gebaseer op starre onderskeide tussen een-dimensionele konsepte soos

publiek/privaat, staat/private onderneming, reël/standaard, kontrak/administratiewe handeling, delik/kontrak wat skynbaar nie meer genoegsaam in verband staan met ervaring in die werklikheid nie.

‘n Analise van Suid-Afrikaanse regspraak rakende kommersiële staatsoptrede openbaar die onderliggende regterlike hipotese dat alle sodanige staatsoptrede geklassifiseer kan word as óf administratiefregtelik óf kontraktueel van aard. Sodra hierdie konseptuele klassifikasie gedoen is, volg die regsreëls van toepassing outomaties. Kommersiële staatsoptrede word gevoglik óf deur administratiefregreëls óf uitsluitlik deur reëls van die privaatreg gereguleer op ‘n wyse wat die keuse van die betrokke regter ontken of verberg. Die kriteria wat gebruik word in die klassifikasie-benadering om die aard van die handeling te klassifiseer het oor tyd verander. Die belangrikste kriteria is die bron van die magte uitgeoefen en die teenwoordigheid van staatsmag, met die howe wat tans hierdie twee kriteria afwissel. Hierdie kriteria kan egter nie met sekerheid geformuleer word nie en dit bied geen konsekwente riglyne nie. Terwyl die kriteria belangrike aspekte van kommersiële staatsoptrede identifiseer wat strenger geregtelike beheer ondersteun, is dit veral die verhouding tussen die onderskeie kriteria sowel as die verhouding tussen die kriteria en die daaropvolgende substantiewe regulasies wat vaag bly.

Uiteindelik word die klassifikasie-benadering gekenmerk deur oormatige konseptualisme en formalisme. Die realiteit dat regters kies watter regulasie om toe te pas op besondere gevalle van kommersiële staatsoptrede bly verborge. Die toepassing van spesifieke substantiewe reëls word voorgehou as natuurlik, onvermydelik en voor-die-hand-liggend. Hierdie benadering sluit dialoog oor sulke keuses uit.

Twee alternatiewe tot die klassifikasie-metodologie bestaan in die Suid-Afrikaanse reg, naamlik ‘n suiwer privaatregtelike benadering en ‘n omvattende publiekregtelike benadering. Die suiwer privaatregtelike benadering fokus op die kommersiële aard van die staatshandelinge, met gevolg dat staatskontraktering soos alle ander vorme van (privaat)-kommersiële optrede gehanteer word. Dit is egter te bevraagteken of die suiwer privaatregtelike regulasie op ‘n bevredigende wyse al die regulatiewe

oogmerke spesifiek tot die publieke konteks van staatsoptrede kan aanspreek. 'n Analise van hierdie alternatiewe benadering dui op belowende privaatreë-leerstukke wat sodanige regulasie kan onderlê, maar aansienlike verdere ontwikkeling van hierdie leerstukke is nodig alvorens die privaatreë die verlangde vlakke van regulasie kan bied. Die omvattende publiekregtelike benadering dring aan op die konsekwente toepassing van publiekregtelike reëls op alle staatsoptrede, ongeag die kommersiële aard van sodanige handelinge. Hoewel hierdie opsie uiters wenslik blyk te wees, veral gegewe die wyse waarop dit publieke oorsig oor alle staatsoptrede verseker, is dit ook nie 'n ideale benadering nie. Veral problematies is die hoë koste van sodanige regulasie en die gepaardgaande ondoeltreffende staatsadministrasie wat, gegewe die eise wat tans aan die Suid-Afrikaanse staatsdiens gestel word, onrealisties mag wees.

Die Duitse en Franse regstelsels verskaf voorbeelde van 'n derde alternatiewe benadering in die vorm van 'n afsonderlike regsfiguur wat bestaan tussen die kontraktereg en die administratiewereg. Die bestaan van so 'n afsonderlike regsfiguur skep die moontlikheid vir die ontwikkeling van afsonderlike regulasie toegespits op die spesifieke behoeftes van daardie figuur. 'n Afsonderlike veld van staatskontrakte of staatshandelsreg kan gevolglik ontstaan. In die Suid-Afrikaanse reg mag dit moontlik wees om sodanige ontwikkeling te stimuleer deur die erkenning van staatskontrakte as 'n afsonderlike, spesifieke klas van kontrakte. Dit is egter te betwyfel of die ontwikkeling van 'n derde kategorie van regulasie die integrasie van privaatreëtelike en publiekregtelike reëls sal bevorder en die konseptualisme van die huidige benadering sal oorkom; dit mag ook bloot konseptualisme versterk deur 'n derde konseptuele kategorie by te voeg.

Die mees belowende alternatiewe metodologie is gegrond op 'n meer komplekse benadering tot die wisselwerkende faktore wat die geregtelike regulering van en die regsbenadering tot kommersiële staatsoptrede onderlê. Sodanige benadering beskou die onderskeid tussen die betrokke konsepte en faktore nie as 'n skerp digotomie nie, maar as aaneenlopende en beweeglike verhoudings. Dit beskou die regsbenadering tot 'n spesifieke geval van kommersiële staatsoptrede as 'n funksie van die verhouding tussen die

verskeie konsepte en faktore. So 'n benadering vereis 'n openliker en meer direkte omgaan met die faktore wat die regulering van kommersiële staatsoptrede onderlê. Uiteindelik vereis dit dat individuele regters verantwoordelikheid sal neem vir die keuses wat hulle maak in hul betrokkenheid by kommersiële staatsoptrede deur middel van die regulatiewe beheer wat hulle daarvoor uitoefen. Dit bevorder gevolglik dialoog en publieke debat oor die rol van die reg in sosiale praktyke soos kommersiële staatsoptrede. Hierdie benadering is in lyn met 'n kultuur van regverdiging (*culture of justification*) en transformatiewe konstitusionalisme (*transformative constitutionalism*) wat die grondslag vorm van demokratiese ontwikkeling in Suid-Afrika.

## ACKNOWLEDGEMENTS

A large number of people contributed in numerous ways to the successful completion of this dissertation and to all of them I owe a word of thanks. Especially thank you to all those friends and colleagues, who engaged with me in academic discourse on a variety of topics relating to this study and who, in doing so, forced me to carefully consider my position on the issues investigated below. In fear of leaving someone out I will not attempt to thank them all by name, but want to introduce these acknowledgements with an innominate thanks to all.

I was fortunate to have had the opportunity in this study to work under the guidance of the two men who originally inspired my interest, especially in an academic sense, in the two areas of law, viz. administrative law and contract law that form the substance of this dissertation. André van der Walt and Gerhard Lubbe did not only interest me in these two areas of law, but also inspired me in pursuing an academic career of which this dissertation is an integral part.

I wish to thank my promotor, André van der Walt, for the encouragement to undertake this study and his continued support in all aspects of it ranging from his critical assessment of its substance to his more pragmatic efforts in creating the breathing room for me in the department to focus on the dissertation, in securing financial assistance and setting me up with his international network to enable research abroad. He remains a tremendous source of inspiration for striving uncompromisingly towards academic excellence. It was a great privilege to have had the opportunity in this study to work under his guidance.

Secondly, I wish to thank my co-promotor and dean, Gerhard Lubbe, for his invaluable contribution in both capacities. On the substance of the dissertation he challenged me to look beyond easy conclusions and to critically assess especially contract law doctrine at the most fundamental level.

Short periods of research abroad were made possible (and enjoyable) by generous hosts in Germany and England. I wish to thank Friedrich

Schoch, his staff and colleagues at the *Institut für Öffentliches Recht IV, Albert-Ludwigs-Universität*, Freiburg im Breisgau, Germany as well as Sue Arrowsmith and the members and staff of the Public Procurement Research Group at the University of Nottingham, England for hosting me and providing me with valuable information and discussion on relevant aspects of their respective legal systems.

I gratefully acknowledge the financial assistance of the National Research Foundation, Stellenbosch University and in particular the Stellenbosch Faculty of Law towards the completion of this dissertation.

Op 'n meer persoonlike noot wil ek graag my familie en vriende bedank vir belangstelling en ondersteuning deur die loop van hierdie studie. Spesifiek dankie aan my ouers en skoonouers wat getrou navraag gedoen het na my vordering en ondersteuning gebied het om my buitelandse navorsing logisties moontlik te maak.

Ten slotte is ek enorme dank aan Marinelle verskuldig. Sy het oor 'n lang tyd al soveel opofferings gemaak ter wille van my akademiese loopbaan insluitende die realisering van hierdie mylpaal, dat 'n paragraaf van erkenning hier skaars voldoende is. Sonder haar volgehoue ondersteuning, hope begrip en selflose aanmoediging sou ek verseker nie hierdie studie kon voltooi of trouens eens in 'n posisie gewees het om dit aan te pak nie. Dit is haar stille sterkte wat my deurlopend gefokus en gemotiveerd gehou het om voort te worstel en my mikpunte doelgerig voor oë te hou. Daarvoor verdien sy my ewige waardering.





## TABLE OF CONTENTS

DETAILED TABLE OF CONTENTS .....	15
LIST OF ABBREVIATIONS .....	23
CHAPTER ONE	
INTRODUCTION, BACKGROUND AND TERMINOLOGY .....	27
CHAPTER TWO	
THE DEVELOPMENT OF THE STATE'S COMMERCIAL CAPACITY .....	69
CHAPTER THREE	
THE CLASSIFICATION APPROACH .....	123
CHAPTER FOUR	
EXCLUSIVELY PRIVATE LAW APPROACH .....	251
CHAPTER FIVE	
COMPREHENSIVE PUBLIC LAW APPROACH .....	375
CHAPTER SIX	
COMBINED PUBLIC/PRIVATE LAW REGULATION .....	445
CHAPTER SEVEN	
MODELLING A JUDICIAL APPROACH TO THE REGULATION OF STATE COMMERCIAL ACTIVITY .....	487
BIBLIOGRAPHY .....	511
TABLE OF CASES .....	534
TABLE OF LEGISLATION .....	551



## DETAILED TABLE OF CONTENTS

LIST OF ABBREVIATIONS .....	23
-----------------------------	----

### CHAPTER ONE

#### INTRODUCTION, BACKGROUND AND TERMINOLOGY

1	Background to the research problem .....	27
1.1	State relationships .....	27
1.2	Courts as regulators .....	29
1.3	Regulatory law scholarship .....	33
2	Research questions .....	33
3	Hypotheses .....	34
4	Aim and methodology .....	35
4.1	Aim .....	35
4.2	Methodology .....	35
4.3	Comparative dimension .....	35
4.3.1	English legal system .....	36
4.3.1.1	Institutional structures .....	36
4.3.1.2	General principles .....	38
4.3.2	German legal system .....	41
4.3.2.1	Institutional structures .....	41
4.3.2.2	General principles .....	44
4.3.3	French legal system .....	48
4.3.3.1	Institutional structures .....	48
4.3.3.2	General principles .....	52
5	Terminology .....	55
5.1	“State” .....	55
5.2	“Commercial activity” .....	60
5.3	“Regulation” .....	65
6	Outline of the study .....	66

## CHAPTER TWO

### THE DEVELOPMENT OF THE STATE'S COMMERCIAL CAPACITY

1	Introduction .....	69
2	Historical conceptual development in South Africa .....	70
2.1	The legal nature of the VOC .....	70
2.2	VOC administration at the Cape .....	72
2.3	Colonial origin of the legal view of state commercial activity .....	74
3	The state's commercial capacity .....	75
3.1	Common law .....	75
3.1.1	Capacity in English or Roman Dutch law? .....	75
3.1.2	The state's common law capacity .....	88
3.1.2.1	Prerogative powers .....	88
3.1.2.2	Legal personality .....	95
3.1.2.3	Limited or unlimited capacity .....	101
3.1.2.3.1	Conditional legal capacity .....	102
3.1.2.3.2	Constitutional limits .....	103
3.2	Legislation .....	111
3.2.1	Express powers .....	111
3.2.2	Implied powers .....	116
4	Conclusion .....	120

## CHAPTER THREE

### THE CLASSIFICATION APPROACH

1	Introduction .....	123
2	Purpose of the classification .....	126
3	Criteria used to classify state commercial action .....	130
3.1	Criterion 1: Identity of the actor .....	130
3.1.1	Limited relevance of the actor's identity .....	130
3.1.2	Defining organs of state .....	133
3.1.2.1	Under common law .....	134
3.1.2.2	In the Constitutions .....	138
3.2	Criterion 2: Source of the power exercised .....	148
3.2.1	The key judgement: <i>Mustapha v Receiver, Lichtenburgh</i> .....	148
3.2.2	Reliance on source in university cases .....	155

3.2.3	The decline of source as criterion .....	157
3.2.4	Current relevance of source as criterion .....	160
3.2.5	Level of generality at which source is determined.....	166
3.3	Criterion 3: The use of superior power or authority.....	170
3.3.1	Development of authority as criterion.....	170
3.3.2	A broad view of authority.....	177
3.3.3	Advantages of a broad view of authority .....	178
3.3.4	Criticism of authority as criterion .....	179
3.3.5	Relevance of the actor's intention .....	185
3.4	Criterion 4: Public interest in the action .....	187
3.4.1	Public interest illustrated in town-planning cases.....	188
3.4.2	Recent revival of public interest as criterion.....	197
3.4.3	Public interest in spending public funds .....	200
3.4.4	Private state interest as opposite of public interest? .....	202
3.5	Criterion 5: Fulfilling a public function .....	206
3.5.1	<i>Service public</i> in French law .....	207
3.5.2	Public purpose of state commercial action.....	208
3.5.3	Government policy in state commercial activity .....	211
3.5.4	Content of the action pointing to a public function.....	213
3.5.5	The functional approach in administrative law .....	218
3.5.6	Causality between action and function.....	221
3.6	Criterion 6: Impact of the action.....	225
3.6.1	Impact as criterion emerging from public service dismissals....	225
3.6.2	Punitive or disciplinary character of state action .....	229
3.6.3	Impact as criterion for “administrative action” under PAJA.....	231
4	Evaluation of the classification approach .....	236
4.1	Criticism of the classification approach.....	236
4.2	Some positive aspects of the classification approach.....	241
5	Conclusion .....	243

## CHAPTER FOUR

### EXCLUSIVELY PRIVATE LAW APPROACH

1	Introduction .....	251
2	Goals in the regulation of state commercial activity .....	254

2.1	Different legal route, same substantive destination .....	254
2.1.1	Public employment dismissal cases.....	255
2.1.2	Private law rules increasing protection of individuals .....	257
2.2	Goal 1: Controlling power disparity in state commercial activity ....	260
2.2.1	Rules relating to the conclusion of the transaction.....	262
2.2.2	Rules relating to the content of the transaction .....	269
2.2.3	Private law treatment of standard-form contracts.....	276
2.2.4	Factors in developing private law to curb abuses of state power .....	282
2.2.4.1	The state as equivalent to private market participants .....	283
2.2.4.2	Public policy as open-ended concept.....	287
2.2.4.3	Differentiated public policy analyses.....	289
2.3	Goal 2: Ensuring fairness in the precontractual phase .....	293
2.3.1	Two-contract approach to tenders.....	295
2.3.2	Standards of conduct in negotiation.....	302
2.3.2.1	Restrictions on refusals to contract.....	303
2.3.2.2	<i>Culpa in contrahendo</i> .....	304
2.3.2.3	Delictual liability for precontractual action.....	307
2.4	Goal 3: Managing the consequences of <i>ultra vires</i> state action.....	310
2.4.1	The English local council interest swaps cases as illustration..	311
2.4.2	A problem not unique to state commercial activity .....	313
2.4.3	Reliance on the doctrine of estoppel.....	317
2.4.4	Restitution or enrichment claims .....	322
2.4.4.1	English law restitution .....	322
2.4.4.2	Unjustified enrichment in South African law.....	324
2.4.4.2.1	<i>Condictio indebiti</i> .....	325
2.4.4.2.2	Enrichment claims dependent on an exclusively private law analysis.....	329
2.4.4.2.3	Policy factors underlying enrichment claims .....	330
2.4.5	Delictual liability for <i>ultra vires</i> acts .....	331
2.5	Goal 4: Restraining the state's motives or purposes.....	333
2.5.1	<i>Mustapha</i> once more .....	334
2.5.2	Controlling motive through implied terms .....	335
2.5.3	Limited capacity and illegality as ways of controlling motive....	338

3	Exclusively private law regulation and state efficiency and effectiveness .....	340
3.1	Relevance of efficiency .....	341
3.2	Factors generating efficiency .....	344
3.3	Competing values .....	348
3.4	Overburdening the state .....	351
4	Private law as reflexive regulation .....	355
4.1	Reflexivity or responsiveness in regulation .....	355
4.2	Contract law as reflexive regulation .....	355
4.3	Reduced reflexivity in state commercial activity .....	357
5	Privity and standing in private law regulation .....	360
5.1	Regulation restricted by limited <i>locus standi in iudicio</i> .....	361
5.2	Limiting the interests relevant to the regulation of state conduct ...	363
5.3	Privity as a way of managing complexity .....	365
6	Conclusion .....	367

## CHAPTER FIVE

### COMPREHENSIVE PUBLIC LAW APPROACH

1	Introduction .....	375
2	A comprehensive public law approach within the South African legal framework .....	377
2.1	State commercial activity as “administrative action” .....	377
2.1.1	“Administrative action” at common law .....	377
2.1.2	The PAJA definition .....	379
2.1.2.1	An adverse impact on rights and direct, external legal effect .....	381
2.1.2.2	Executive action excluded .....	381
2.1.2.3	A decision of an administrative nature .....	383
2.1.2.4	Exercising a power in terms of a constitution or legislation .....	386
2.2	The generally applicable public law principle of legality .....	387
3	Recognition of the added dimension to state commercial activity .....	391
3.1	Equating the state with private actors .....	392
3.2	Recognising the added dimension .....	394
3.2.1	Tender cases .....	394

3.2.2	Factors of an added dimension.....	397
3.3	Nature and content of the added dimension.....	398
4	Advancing a culture of justification and transformative constitutionalism.....	400
4.1	Transparency, accountability and participation.....	402
4.2	Beyond a culture of justification.....	405
4.3	Regulating private power.....	409
4.4	Administrative justice as an autonomous goal.....	410
5	Efficiency and effectiveness implications of a comprehensive public law approach.....	414
5.1	The flexibility or variability of public law rules.....	416
5.1.1	Procedural fairness.....	420
5.1.2	Reasonableness, reasons, lawfulness and legality.....	422
5.1.3	Striking a balance between public interest and efficiency.....	424
5.1.4	Enhancing efficiency.....	425
5.2	The impact of the availability of judicial review.....	427
5.2.1	Efficiency decreased by increased flexibility.....	429
5.2.2	The adverse impact illustrated by <i>Steenkamp NO v Provincial Tender Board, EC</i> .....	430
5.2.2.1	Performance delayed.....	431
5.2.2.2	Risk and hence cost increased.....	433
5.2.3	Public and private regulation combined in an optimal approach.....	434
5.2.4	Developing compensation as public law remedy.....	435
5.2.5	Restrictions on judicial review.....	436
6	Ambit of “the state” and the scope of regulation.....	437
7	Conclusion.....	439

## CHAPTER SIX

### COMBINED PUBLIC/PRIVATE LAW REGULATION

1	Introduction.....	445
2	A specialised branch of government contract law.....	446
2.1	Judicial development of a distinct branch of law.....	446
2.1.1	The French example.....	447



2.1.2	Impetus for judicial development.....	450
2.1.3	Methodology of judicial development .....	452
2.1.3.1	The traditional <i>essentialia</i> model .....	452
2.1.3.2	The alternative <i>Typenlehre</i> model .....	454
2.1.4	Nodes of development other than the law of contract.....	456
2.2	Advantages and disadvantages of a separate branch of law.....	458
2.2.1	Special focus on the unique features of state contracting .....	458
2.2.2	Increased likelihood of normative ordering of public contracting .....	460
2.2.3	Keeping public and private contracting apart .....	461
2.2.4	Remaining classification problems .....	462
2.2.5	Limited combination of private and public law.....	464
3	Regulation on a continuum between private and public law.....	465
3.1	A complex view of the public/private divide .....	467
3.2	Regulating state commercial activity on a continuum .....	469
3.3	A continuum approach in South African law .....	472
3.4	Advantages of a continuum approach .....	474
3.4.1	Reduced conceptual reasoning.....	474
3.4.2	Advancing transformative constitutionalism .....	476
3.4.3	Continuity as central characteristic.....	477
4	Conclusion .....	482

## CHAPTER SEVEN

### MODELLING A JUDICIAL APPROACH TO THE REGULATION OF STATE COMMERCIAL ACTIVITY

1	Introduction .....	487
2	Existing models .....	490
2.1	The current classification approach .....	490
2.2	Removing choice from the model .....	491
2.2.1	Single category approach .....	491
2.2.2	Cumulative approach .....	493
2.2.3	<i>A priori</i> choice .....	494
3	Developing new models .....	494
3.1	Combining public and private law regulation .....	495

3.1.1	A third category.....	495
3.1.2	Complex choice .....	496
3.2	Considerations in developing a new model .....	498
3.2.1	Conceptions of the state .....	499
3.2.1.1	Capacity.....	499
3.2.1.2	Relationship between the different branches of state .....	501
3.2.1.3	Signals of faith or mistrust.....	501
3.2.2	State commercial action as an instrument of policy .....	503
3.2.3	Government efficiency and effectiveness.....	503
3.2.4	Certainty.....	504
3.2.5	Constitutional transformation .....	504
4	Conclusion .....	505

BIBLIOGRAPHY .....	511
--------------------	-----

#### TABLE OF CASES

1	South Africa.....	534
2	Canada .....	548
3	France.....	548
4	Germany .....	549
5	United Kingdom.....	549
6	Zimbabwe .....	550

#### TABLE OF LEGISLATION

1	South Africa.....	551
2	France.....	552
3	Germany .....	552
4	United Kingdom.....	553

## LIST OF ABBREVIATIONS

1993 Constitution	Constitution of the Republic of South Africa Act 200 of 1993
AGBG	Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen
AJA	Acting Judge of Appeal
ASSAL	Annual Survey of South African Law
Australian LJ	Australian Law Journal
BayVBl	Bayerische Verwaltungsblätter
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof
Buffalo L Rev	Buffalo Law Review
BVerfG	Bundesverfassungsgericht
BVerwG	Bundesverwaltungsgericht
California L Rev	California Law Review
Cambridge LJ	Cambridge Law Journal
Cf	Compare
CILSA	Comparative and International Law Journal of Southern Africa
CJ	Chief Justice
Constitution	Constitution of the Republic of South Africa 1996
Dalhousie LJ	Dalhousie Law Journal
DCJ	Deputy Chief Justice

DÖV	Die öffentliche Verwaltung
DVBl	Deutsches Verwaltungsblatt
ed(s)	editor(s)/edition
eg	for example
et seq	and the following
GG	Grundgesetz für die Bundesrepublik Deutschland/Government Gazette
Harvard LR	Harvard Law Review
ie	that is
ILJ	Industrial Law Journal
J	Judge
JA	Judge of Appeal
JuS	Juristische Schulung
JZ	Juristenzeitung
LJ	Lord Justice
LQR	Law Quarterly Review
Macquarie LJ	Macquarie Law Journal
McGill LJ	McGill Law Journal
Melbourne University LR	Melbourne University Law Review
MLR	Modern Law Review
New LJ	New Law Journal
New Zealand Universities LR	New Zealand Universities Law Review
NJW	Neue Juristische Wochenschrift
NVwZ	Neue Zeitschrift für Verwaltungsrecht

NVwZ-RR	Rechtsprechungs-Report der Neuen Zeitschrift für Verwaltungsrecht
NWVBI	Nordrhein-westfälische Verwaltungsblätter
OJLS	Oxford Journal of Legal Studies
OVG	Oberverwaltungsgericht
P	President
PAJA	Promotion of Administrative Justice Act 3 of 2000
par	Paragraph
Public LR	Public Law Review
Public Procurement LR	Public Procurement Law Review
s	section
SA Merc LJ	South African Mercantile Law Journal
SAJHR	South African Journal for Human Rights
SALC	South African Law Commission
SALJ	South African Law Journal
SAPR/PL	SA Publikreg/Public Law
SAYIL	South African Yearbook of International Law
ss	subsection
Stanford LR	Stanford Law Review
Stell LR	Stellenbosch Regstydskrif/Law Review
Texas LR	Texas Law Review
THRHR	Tydskrif vir Hedendaagse Romeins- Hollandse Reg

TSAR	Tydskrif vir Suid-Afrikaanse Reg
University of Chicago LR	University of Chicago Law Review
University of Toronto LJ	University of Toronto Law Journal
VerwArch	Verwaltungsarchiv
VVDStRL	Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer
VwVfG	Verwaltungsverfahrensgesetz
Yale LJ	Yale Law Journal
ZRP	Zeitschrift für Rechtspolitik

# CHAPTER ONE

## INTRODUCTION, BACKGROUND AND TERMINOLOGY

### 1 Background to the research problem

#### 1.1 State relationships

Traditionally and at a very basic level, public law is viewed in South Africa as that branch of law that regulates the state and its activities.<sup>1</sup> A multitude of legal rules have developed to regulate especially the executive authorities' actions. These rules are found mostly, but not exclusively, in the field of administrative law.<sup>2</sup> A number of rationales justify the existence of these rules of public law,<sup>3</sup> including the supervision of public funds, the enforcement of statutory duties, the facilitation of state-citizen interaction, the coordination of functions on different levels of government and the enhancement of effective state administration. The overarching purpose of these rules of public law is, however, to serve as a check on public power or, viewed positively, to provide the legal framework for the exercise of public power.<sup>4</sup>

---

<sup>1</sup> Hosten *et al* *Introduction to South African Law and Legal Theory* 272 – 274, 597; Hahlo & Kahn *The South African Legal System and Its Background* 116; Boule (1987) 104 SALJ 104.

<sup>2</sup> Hoexter *Administrative Law in South Africa* 2 – 7; Baxter *Administrative Law* 50 – 56; Wiechers *Administratiefreg* 8 – 9.

<sup>3</sup> See Cane in Parker *et al* (eds) *Regulating Law* 213 – 216.

<sup>4</sup> Wade & Forsyth *Administrative Law* 4 – 7; Boule (1987) 104 SALJ 104; Baxter *Administrative Law* 63, 73; Hoexter *Administrative Law in South Africa* 9, 56; Ehlers in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 161; Farina (2004) 19 SAPR/PL 489 at 502: “So, the goal of administrative law is to *constrain* the exercise of government power and discretion – *and* the goal of administrative law is to *facilitate* the exercise of government power and discretion.” But see Cane in Parker *et al* (eds) *Regulating Law* 216 who warns against “jumping ... to the conclusion that [administrative law] has one overarching goal as opposed to a multiplicity of goals.” My use of “purpose” here is perhaps more general than Cane’s use of “goals” so that the two are not synonyms in the current context. While I view the overarching *purpose* of administrative law rules, positively, as providing the legal framework for the exercise of public power, such framework may at the same time contain numerous normative *goals*, such as efficient administration and transparency. Accordingly, I find no contradiction in both arguing that administrative law has one overarching purpose and agreeing with Cane that “administrative law has various ‘local’ and specific goals that interact

This function is dependent on a relationship of inequality, that is, a relationship where one party, the state, acts from a position of public power, while the counterparty acts from a position of subordination.<sup>5</sup> However, in a limited number of instances organs of state find themselves ostensibly in relationships of equality<sup>6</sup> and difficult legal questions emerge in such instances since equal relationships are traditionally subject to private law and not public law regulation. As Brassey notes in relation to public employment:

The State as employer inhabits two legal worlds: contract law and administrative law. Courts have wrestled how best to characterise and deal with its acts in this capacity.<sup>7</sup>

Brassey's point can be extended to a wider category of state action, namely state commercial activity. In these instances organs of state participate in (private) market transactions where the relationships between the actors are predominantly private law regulated, mostly by the law of contract. Courts and the law in general find it difficult to deal with this category of state action in the light of the hybridity of these actions from the perspective of the traditional private/public distinction.<sup>8</sup>

---

in complex ways." Cane himself seems to be in agreement with this view where he states at 221: "[T]he main function of rules and principles of administrative law is to guide conduct..."

<sup>5</sup> Wiechers *Administratiefreg* 3, 50 – 51.

<sup>6</sup> *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 356 – 358; *Sibanyoni v University of Fort Hare* 1985 1 SA 19 (CKS) at 30 – 31; *Mkhize v Rector, University of Zululand and Another* 1986 1 SA 901 (D) at 904; *Scholtz v Cape Divisional Council* 1987 1 SA 68 (C); *Naran v Head of the Department of Local Government, Housing and Agriculture (House of Delegates) and Another* 1993 1 SA 405 (T) at 408; *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 3 SA 1013 (SCA) at par 18; *Logbro Properties CC v Bedderson NO and Others* 2003 2 SA 460 (SCA) at par 10; *Steenkamp NO v The Provincial Tender Board of the Eastern Cape* 2006 3 SA 151 (SCA) at par 12; Wiechers *Administratiefreg* 50 – 52, 91, 131; D'Oliviera *State Liability for the Wrongful Exercise of Discretionary Powers* 5 – 7; Booysen (1984) 9 SAYIL 56 at 60.

<sup>7</sup> Brassey *et al Commentary on the Labour Relations Act* A7-149.

<sup>8</sup> Black & Muchlinski in Black, Muchlinski & Walker (eds) *Commercial Regulation & Judicial Review* 15 aptly capture what may be described as the exact opposite or mirror problem in the area of commercial regulation (ie public oversight of private commercial action): "Commercial regulation frequently combines institutional structures and legal instruments



At present this area of South African law is not well developed. Apart from piecemeal and fragmented statutory regulation of a variety of matters relevant to and touching upon these instances, South African courts have struggled to decide whether to apply either public law, specifically administrative law, or private law, specifically the law of contract, to such relationships.<sup>9</sup> The criteria to decide which one should govern remain unclear and are at present in a state of constant flux. There is accordingly a need to investigate these relationships and to evaluate the forms of regulation that might be applied to such instances.

## 1.2 Courts as regulators

While common law is not often viewed in legal scholarship as a form of regulation, that is as a tool aimed at “influencing the behaviour of people to accomplish particular social objectives”,<sup>10</sup> courts undoubtedly fulfil such a function in terms of common law. In scholarship on regulation it is more widely recognised that courts fulfil a regulatory function beyond that of mere mechanisms to enforce regulatory standards formulated by the legislature or executive agencies.<sup>11</sup> As Hugh Collins notes: “The courts are ... performing a similar function to regulatory agencies by determining goals and selecting rules to achieve those goals.”<sup>12</sup> He presents a number of arguments that point out the instrumental function of common law adjudication. One of these is based on strategic litigation and is particularly relevant in the present context.<sup>13</sup> Studies of how rules are in fact made by courts reveal that powerful repeat litigants such as the government play an important role in shaping the legal landscape. These powerful repeat players have the necessary

---

which are familiar subjects of private law with a function which is the usual subject of public law. Judicial review (and indeed aspects of private law) are having to adapt to meet this new hybridity.”

<sup>9</sup> Hoexter (2004) 121 *SALJ* 595 at 596.

<sup>10</sup> Parker *et al* in Parker *et al* (eds) *Regulating Law* 5. See par 5.3 below for a description of the term “regulation”.

<sup>11</sup> Parker *et al* in Parker *et al* (eds) *Regulating Law* 4.

<sup>12</sup> Collins in Parker *et al* (eds) *Regulating Law* 22.

<sup>13</sup> See Collins in Parker *et al* (eds) *Regulating Law* 20 – 22.

resources to return to especially the higher courts where legal rules are predominantly generated, but where litigation is also most costly, in successive cases to secure a favourable legal regime. Collins argues that

[t]he courts are aware, of course, of the instrumental purposes for which the repeat players litigate before them. In reaching their determinations, they must consider the potential consequences to the powerful actors, and, therefore, refine the rule in ways that to the judges appears to provide a suitable consequential outcome for these actors. From this sociological perspective on legal reasoning, the setting of rules through judicial determinations ... is necessarily an instrumental task...<sup>14</sup>

It follows that in cases of state commercial activity where one of the parties, the state, is by implication a repeat player, the courts fulfil a significant regulatory function. In South Africa this argument is illustrated by the recent judgement in *Steenkamp NO v Provincial Tender Board, Eastern Cape*<sup>15</sup> where the Constitutional Court refused to label negligent but *bona fide* mistakes in public administration as wrongful in a delictual sense, thereby denying delictual liability on the part of the state for damages flowing from such mistakes. In justifying this conclusion the court expressly noted the “consequential outcome” for the state. It particularly referred to the burden delictual liability would place on public funds;<sup>16</sup> that such liability “may hamper administrative organs unduly in the execution of their duties”<sup>17</sup> and that such remedy would not be an appropriate way of enhancing accountability in government.<sup>18</sup>

---

<sup>14</sup> Collins in Parker *et al* (eds) *Regulating Law* 22.

<sup>15</sup> 2007 3 SA 121 (CC).

<sup>16</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) at par 33, 40.

<sup>17</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) at par 37.

<sup>18</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) at par 39. The Constitutional Court expressly endorsed these considerations that motivated the judgement of the Supreme Court of Appeal: *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 47, 55, 56. Another example of Collins’s argument in South African law is the case of *Transnet Ltd and*

In South Africa the instrumental function of courts take on another, more critical, dimension. A number of scholars have noted that “courts can play a vital role in building a democratic culture of justification” in South Africa.<sup>19</sup> As guardians of the Constitution courts are inextricably involved in the process of transformative constitutionalism.<sup>20</sup> Karl Klare accordingly notes: “Adjudication uniquely reveals ways in which law-making and, by extension, legal practices generally, are and/or could be a medium for accomplishing justice.”<sup>21</sup>

However, the fact that courts do act as regulators and as such can play an important role in constitutional transformation in South Africa does not tell us how the courts should go about fulfilling that function. As Van der Walt & Botha argue it *inter alia* “does not tell us where to draw the line between legitimate exercises of the review power, and the judicial usurpation of the legislative and/or executive function.”<sup>22</sup> This study considers the courts’

---

*Others v Chirwa* 2007 2 SA 198 (SCA). It has been a contentious question whether dismissals of and disciplinary actions against public servants are subject to administrative law review in South Africa. The state has repeatedly argued that these matters can only be dealt with in terms of labour law since such actions do not amount to the exercise of public power. Following divergent treatment of this question in the High Courts and Labour Courts (see Grogan (2006) April *Employment Law Journal* 3, (2006) October *Employment Law Journal* 4), the state (in the form of the state-owned public transport enterprise, Transnet) took this question to the Supreme Court of Appeal in the *Chirwa* matter. In a three-to-two ruling the Supreme Court of Appeal held that the Transnet employee in that case could not challenge her dismissal on administrative law grounds before a High Court. However, no majority of judges agreed on the reasons for that ruling – Mthiyane JA wrote a judgement in which Jafta JA concurred; Conradie JA concurred only in the order proposed by Mthiyane JA, but for different reasons and Cameron JA, with whom Mpati DP concurred, wrote a dissenting judgement. This matter has now been heard by the Constitutional Court, but no judgement has been delivered to date (31 October 2007). This matter illustrates the government’s ability (and willingness) to pursue a matter in litigation before the higher courts in order to secure a favourable legal environment, in this case removing public service decisions from administrative law scrutiny.

<sup>19</sup> Van der Walt & Botha (2000) 7 *Constellations* 341 at 344; Mureinik (1994) 10 *SAJHR* 31; Klare (1998) 14 *SAJHR* 146.

<sup>20</sup> Klare (1998) 14 *SAJHR* 146 at 147 *et seq.*

<sup>21</sup> Klare (1998) 14 *SAJHR* 146 at 147.

<sup>22</sup> Van der Walt & Botha (2000) 7 *Constellations* 341 at 344.

approach to their regulatory function in relation to one specific set of state action, namely state commercial activity. There are a number of reasons why I focus specifically on judicial regulation rather than other forms of legal control of state commercial activity.

Understanding judicial practice can help us understand law in general.<sup>23</sup> In the context of state commercial activity the potential of an analysis of adjudication is critically important. Given the fragmented nature of the statutory treatment of state commercial activity in South African law,<sup>24</sup> the common law presents the only form of legal regulation that can yield a coherent legal view of state commercial activity. In order to develop a better understanding of the legal treatment of state commercial activity in South Africa, it therefore seems sensible to assess the judicial approach to such state conduct as a point of departure. South African law will not be able to regulate state commercial activity effectively and coherently if the judicial approach to such activity is not clear and functional.

In contrast to legislative and executive regulation the regulatory function of courts is much more veiled. Courts' instrumental role is an implicit one. However, the Constitution requires judicial practices that are open, transparent, accountable and participatory.<sup>25</sup> Since the social objectives pursued under a regulatory intention are often politically contested<sup>26</sup> it becomes important to develop a clear understanding of the regulatory function of courts and to embrace a judicial approach that openly acknowledges its instrumental function. These considerations highlight the importance of focusing attention on the regulatory function of courts in relation to state action.

While common law forms the bulk of the courts' arsenal of regulatory tools in controlling state commercial activity, the focus of the study is not on

---

<sup>23</sup> Mureinik in Corder (ed) *Essays on Law and Social Practice in South Africa* 182. See also Klare (1998) 14 *SAJHR* 146 at 147 *et seq*.

<sup>24</sup> See Penfold & Reyburn in Woolman *et al* (eds) *Constitutional Law of South Africa* 25-2.

<sup>25</sup> Langa (2006) 17 *Stell LR* 351 at 353; Klare (1998) 14 *SAJHR* 146 at 150, 156 *et seq*; Hoexter (2000) 117 *SALJ* 484 at 500.

<sup>26</sup> Parker *et al* in Parker *et al* (eds) *Regulating Law* 5.

common law *per se*, but on judicial regulation. The central issue is therefore not what specific legal rules to apply to state commercial activity, but how the courts decide what law to apply. As I will argue in chapter three the traditional and basic choice is between rules of contract law and rules of administrative law. Following the entrenchment of the right to just administrative action in section 33 of the Constitution and the enactment of PAJA to give effect to that right, administrative law is no longer primarily a common law field. However, that makes no difference in the context of this study since the central question is how the courts decide to subject state commercial activity to one branch of law rather than another.

### **1.3 Regulatory law scholarship**

Based on the background discussion in paragraphs 1.1 and 1.2 above this study can be labeled as regulatory law scholarship. It has a regulatory perspective in that it asks “normative questions about how law and regulatory technique can be designed to be most effective at accomplishing social goals.”<sup>27</sup> But it also engages in legal analysis in the way that it “take[s] an internal approach to law that focuses on the content of legal doctrine and its coherence.”<sup>28</sup>

## **2 Research questions**

This study will address the following questions:

- What is the most effective approach to the judicial regulation of state commercial activity?
- How does this approach compare to the current position in South African law and in other legal systems?
- More specifically: what are the problems experienced with the current judicial approach to the regulation of state commercial activity in South

---

<sup>27</sup> Parker *et al* in Parker *et al* (eds) *Regulating Law* 3.

<sup>28</sup> Parker *et al* in Parker *et al* (eds) *Regulating Law* 3.

Africa and how can these be best addressed taking into account the unique South African context of constitutional transformation?

### **3 Hypotheses**

The main hypothesis underlying this study is that the current judicial treatment of state commercial activity in South Africa is deficient. The current approach is premised on the flawed notion that all state commercial activity can be classified as subject to either contract law regulation or administrative law regulation. This conceptual approach attempts to classify the relevant state commercial action as either administrative action or exclusively contractual in nature, based on criteria that are inherently vague and/or unworkable. The result of this conceptualism and resultant formalism is an undifferentiated application of either general contract law rules or general administrative law rules to state commercial activity, which in reality differs significantly from the orthodox doctrinal concepts of private law contract and administrative action. The hypothesis is thus that the current judicial approach to the regulation of state commercial activity fails to produce legal treatment of such state conduct that accurately and effectively responds to the peculiarities of state commercial activity.

If this hypothesis is correct South African law needs to be developed in order to facilitate effective legal regulation of state commercial activity. My second hypothesis is thus that alternative models of the judicial approach to the regulation of state commercial activity can be constructed. Such a construction of alternative models can be situated within South African law, but is not limited to the existing South African framework. A further secondary hypothesis is that it should be possible to assess the strengths and weaknesses of these alternative models in relation to each other and particularly against the demands of constitutional transformation in South Africa. Finally, the assessment of the various models and in particular their respective advantages and disadvantages should enable us to identify the contours of a model that can overcome the conceptualism of the current approach and is better aligned with transformative constitutionalism in South Africa.

## **4 Aim and methodology**

### **4.1 Aim**

The objective of this study is to examine the current judicial treatment of state commercial activity in South Africa in order to illustrate the inadequacies of such treatment. This includes an investigation into the reasons for its failures. Consequently, the study aims to identify and assess alternative judicial approaches to the regulation of state commercial activity. Ultimately, the aim is to suggest improved ways of approaching the judicial regulation of state commercial activity.

### **4.2 Methodology**

The study is based on an analysis of the existing South African jurisprudence relating to state commercial activity. Case law is carefully examined in order to trace the historical development of an identifiable, distinct approach to the judicial regulation of state commercial activity as well as potential alternative approaches. Scholarly work on the public/private divide and in complexity theory is drawn upon to suggest the development of alternative approaches. The study also notes relevant developments in comparable legal systems as a source of ways in which alternative approaches to the judicial regulation of state commercial activity can be developed in South Africa.

### **4.3 Comparative dimension**

The study includes a dimension of comparative legal analysis with specific reference to English, German and French law. These analyses are integrated into the discussion of the South African law rather than dealt with in separate chapters or sections. Consequently, the relevant basic tenets of these three systems are briefly set out here in order to contextualise the integrated comparative references in the rest of the study. The reasons for using these specific three systems for comparative purposes are also set out in the respective discussions below. In each paragraph the institutional structures of the particular system will be set out briefly with specific emphasis on the

executive function and judicial control of that function. That will be followed by a brief discussion of general principles in each system that are relevant to the treatment of state commercial activity within that system.

### **4.3.1 English legal system**

#### **4.3.1.1 Institutional structures**

As a result of the struggles between the Monarch and Parliament in English political history, Parliament attained supreme legal authority and the Court of King's Bench became its agent in subjecting state power to Parliament's will.<sup>29</sup> There is no strict separation of powers in the English constitutional system with the Crown functioning as the nominal seat of legislative, executive and judicial power.<sup>30</sup> The United Kingdom is, however, a constitutional monarchy, which means that the Monarch exercises governmental power only through elected representatives.<sup>31</sup>

In the English system Parliament has supreme power and is said to be sovereign, which means that it can legislate on any matter it wishes and its legislation is the highest authority in the land,<sup>32</sup> subject only to European Community authority.<sup>33</sup>

The executive function of government is exercised by members of Parliament appointed to ministerial office by the Monarch on advice from the

---

<sup>29</sup> Jackson & Leopold *O Hood Phillips and Jackson Constitutional and Administrative Law* 239 – 47; Wade & Forsyth *Administrative Law* 14; Baxter *Administrative Law* 21; Mitchell 1965 *Public Law* 95 at 97.

<sup>30</sup> Parliament legislates as “the Queen in Parliament”, the executive is “the Queen's Government” with the Queen as the Head of state and in “the Royal Courts of Justice” the judicial authority is presided over by “Her Majesty's judges”. Jackson & Leopold *O Hood Phillips and Jackson Constitutional and Administrative Law* 26.

<sup>31</sup> Jackson & Leopold *O Hood Phillips and Jackson Constitutional and Administrative Law* 22.

<sup>32</sup> Jackson & Leopold *O Hood Phillips and Jackson Constitutional and Administrative Law* 22, 47; Wade & Forsyth *Administrative Law* 26.

<sup>33</sup> Jackson & Leopold *O Hood Phillips and Jackson Constitutional and Administrative Law* 67 – 72, 116 – 128; Wade & Forsyth *Administrative Law* 4, 26 – 29.



Prime Minister.<sup>34</sup> The highest executive functions are fulfilled by the Prime Minister and Cabinet, which comprises of the inner circle of ministers invited to Cabinet by the Prime Minister.<sup>35</sup> An important feature of the English system is that ministers, including the Prime Minister, are responsible to Parliament – they answer to Parliament regarding their conduct and can only retain office as long as they hold the support and confidence of Parliament.<sup>36</sup> Government departments are headed by ministers, but staffed by a permanent non-political civil service, who are all Crown servants.<sup>37</sup>

The judicial authority in English law rests in the Royal Courts of Justice. At its apex is the House of Lords sitting as a final court of appeal.<sup>38</sup> Below the House of Lords is a single Supreme Court divided into two levels<sup>39</sup> and a number of divisions,<sup>40</sup> with a number of inferior courts below.<sup>41</sup> There is, however, only one jurisdiction and all matters are heard by one or more courts within the single system of courts.<sup>42</sup> Procedural reforms of the 1970's and 1980's have introduced to the English legal system a distinction between the adjudication of private law and public law disputes.<sup>43</sup> These include a distinct procedure, with severe time constraints, to be followed in judicial review cases in contrast to other "ordinary" matters.<sup>44</sup> Judicial review cases are heard in

---

<sup>34</sup> Jackson & Leopold *O Hood Phillips and Jackson Constitutional and Administrative Law* 22, 23, 26, 313, 345, 359, 370.

<sup>35</sup> Jackson & Leopold *O Hood Phillips and Jackson Constitutional and Administrative Law* 342 – 347.

<sup>36</sup> Jackson & Leopold *O Hood Phillips and Jackson Constitutional and Administrative Law* 23; Wade & Forsyth *Administrative Law* 30 – 32.

<sup>37</sup> Jackson & Leopold *O Hood Phillips and Jackson Constitutional and Administrative Law* 370, 377; Wade & Forsyth *Administrative Law* 51.

<sup>38</sup> Jackson & Leopold *O Hood Phillips and Jackson Constitutional and Administrative Law* 196 – 198, 422.

<sup>39</sup> In civil matters these are known as the Court of Appeal and the High Court respectively.

<sup>40</sup> Jackson & Leopold *O Hood Phillips and Jackson Constitutional and Administrative Law* 422.

<sup>41</sup> Jackson & Leopold *O Hood Phillips and Jackson Constitutional and Administrative Law* 420 – 423.

<sup>42</sup> De Smith, Woolf & Jowell *Judicial Review of Administrative Action* 5, 156 – 157.

<sup>43</sup> Wade & Forsyth *Administrative Law* 650 – 660.

<sup>44</sup> Wade & Forsyth *Administrative Law* 652, 654 – 660.

the High Court by judges specifically identified to adjudicate such matters.<sup>45</sup> However, these reforms do not constitute a separate jurisdiction for public law matters, such as those found in many continental European systems, and the most recent procedural reforms provide for the transfer of matters between the different procedures.<sup>46</sup>

#### 4.3.1.2 General principles

The “outstanding characteristic” of the English administrative law system is the control of the ordinary courts of law over government action.<sup>47</sup> The fundamental constitutional arrangements of the English system, as set out above, are expressed in the legal principles of rule of law and *ultra vires*. Rule of law, in its simplest form, means that “everything must be done according to law”<sup>48</sup> and it implies that all governmental action is subject to law and can be tested as such in the ordinary courts of the land.<sup>49</sup> Linked to this basic constitutional principle is the doctrine of *ultra vires*, which has been described as the “central principle of administrative law.”<sup>50</sup> In terms of this principle the courts traditionally had the power to review administrative action and set it aside should it be found to be beyond the powers granted to the administrator.<sup>51</sup> In recent years the review powers of the courts have developed beyond a narrow focus on the limits of the empowering provision, or *vires*, to general scrutiny of the lawful exercise of power.<sup>52</sup> Over time these

---

<sup>45</sup> Harlow & Rawlings *Law and Administration* 553. This was originally called the Crown Office List, but has been renamed in the 1999 Woolf reforms to the Administrative Court: Wade & Forsyth *Administrative Law* 653, 676.

<sup>46</sup> Wade & Forsyth *Administrative Law* 678. Also see Oliver in Craig & Rawlings (eds) *Law and Administration in Europe* 83.

<sup>47</sup> Wade & Forsyth *Administrative Law* 10.

<sup>48</sup> Wade & Forsyth *Administrative Law* 20.

<sup>49</sup> Jowell in Jowell & Oliver (eds) *The Changing Constitution* 19, 23.

<sup>50</sup> *Boddington v British Transport Police* [1999] 2 AC 143 at 171 (per Lord Steyn): “I see no reason to depart from the orthodox view that *ultra vires* is ‘the central principle of administrative law’”; Wade & Forsyth *Administrative Law* 35.

<sup>51</sup> Wade & Forsyth *Administrative Law* 35 – 37.

<sup>52</sup> This development has been characterised by fierce, especially academic, debate on the exact basis of judicial review in English law, with strong arguments being presented that the

basic principles developed to such an extent that administrative law is today largely equated with judicial review of administrative action in English law.<sup>53</sup>

There is no separate administrative or constitutional jurisdiction to adjudicate judicial review (or other public law) cases, but such matters are dealt with in the ordinary civil courts.<sup>54</sup>

An important consequence of these basic constitutional principles in English law is the traditional near absence of a distinction between private and public law as known in Continental European systems.<sup>55</sup> However, recent developments in English law introduced such a distinction to a limited extent.<sup>56</sup> One important consequence of the absence of a distinct public law

---

basis of review cannot, or at least no longer, be seen as the *ultra vires* doctrine, see De Smith, Woolf & Jowell *Judicial Review of Administrative Action* 249 – 251; Oliver 1987 *Public Law* 543; Craig (1998) 58 *Cambridge LJ* 63, 1999 *Public Law* 428; Jowell 1999 *Public Law* 448; Lord Woolf 1995 *Public Law* 57 (describing reliance on the *ultra vires* doctrine as the basis of the courts' judicial review jurisdiction as a fairy tale) and also the papers collected in Forsyth (ed) *Judicial Review & The Constitution*. It seems that whatever the exact basis of judicial review is, it remains closely linked with the basic constitutional principle of rule of law.

<sup>53</sup> Wade & Forsyth *Administrative Law* 6.

<sup>54</sup> Lord Woolf 1995 *Public Law* 57, however, suggests that the procedural changes regarding judicial review brought about since the late 1970's in England has had the effect that "while the principles [of public law] are enforced by the High Court ... and not a separate supreme public or administrative law tribunal, the High Court when applying those principles is not exercising its normal jurisdiction. It is exercising a quite separate jurisdiction: its inherent power to review administrative action." However, see Oliver in Craig & Rawlings (eds) *Law and Administration in Europe* 83, who argues: "[T]he Administrative Court is far from being an equivalent of the French Conseil d'Etat, for instance, with members who are separate from the judiciary, and its own exclusive jurisdiction, procedures and substantive law. It is really no more than a list of judges who spend only part of their time on judicial review, and it is part of the High Court."

<sup>55</sup> Oliver in Craig & Rawlings (eds) *Law and Administration in Europe* 83; De Smith, Woolf & Jowell *Judicial Review of Administrative Action* 156 – 158; Mitchell 1965 *Public Law* 95; Harlow (1980) 43 *MLR* 241; Baxter *Administrative Law* 56.

<sup>56</sup> Wade & Forsyth *Administrative Law* 661 – 678; De Smith, Woolf & Jowell *Judicial Review of Administrative Action* 157 – 167; Baxter *Administrative Law* 56 – 63; Arrowsmith *Civil Liability and Public Authorities* 2, 20 – 27; Garner 1978 *Public Law* 230; Harlow (1980) 43 *MLR* 241; Cane in Bamforth & Leyland (eds) *Public Law in a Multi-Layered Constitution* 247;

system in English law is the treatment of state commercial activity in terms of “normal” private law, in particular the law of contract, as it applies to all other commercial actors.<sup>57</sup> There is consequently no distinct legal concept of an administrative contract in English law. Contractual actions of the state are furthermore not subject to judicial review as such.<sup>58</sup> However, in recent years English courts have shown a much greater willingness than in the past to subject state commercial activity to judicial review akin to that of administrative action.<sup>59</sup> But Arrowsmith cautions that “it would be premature to say that the courts now accept that the contractual powers of public authorities are subject to review in the same manner as other powers of government.”<sup>60</sup> In cases where English courts have exercised their review jurisdiction over state commercial action they did so because of some additional public law element in such action.<sup>61</sup> In conjunction with the increased judicial scrutiny of state commercial action there has been an exponential growth in English law scholarship regarding administrative law treatment of contractual questions.<sup>62</sup>

---

Swainston in Black, Muchlinski & Walker (eds) *Commercial Regulation & Judicial Review* 98; Harlow & Rawlings *Law and Administration* 8. See, however, Oliver in Craig & Rawlings (eds) *Law and Administration in Europe* 84, who argues that the most recent procedural reforms “have actually *reduced* the distinctiveness of the judicial review procedure by linking it with private law procedures ...”

<sup>57</sup> Turpin in Von Mehren (ed) *International Encyclopedia of Comparative Law Volume VII Contracts in General* 31 – 32; Arrowsmith (1990) 106 *LQR* 277, *Civil Liability and Public Authorities* 1, 5; Hogg *Liability of the Crown* 118; Harden *The Contracting state* 37; De Smith, Woolf & Jowell *Judicial Review of Administrative Action* 173; Harlow & Rawlings *Law and Administration* 208.

<sup>58</sup> Arrowsmith (1990) 106 *LQR* 277, *Civil Liability and Public Authorities* 85; Harden *The Contracting State* 37; De Smith, Woolf & Jowell *Judicial Review of Administrative Action* 178; Bailey 2007 *Public Law* 444.

<sup>59</sup> Arrowsmith (1990) 106 *LQR* 277, *Civil Liability and Public Authorities* 85 – 89.

<sup>60</sup> Arrowsmith (1990) 106 *LQR* 277.

<sup>61</sup> Bailey 2007 *Public Law* 444; Arrowsmith (1990) 106 *LQR* 277, *Civil Liability and Public Authorities* 85 – 89; De Smith, Woolf & Jowell *Judicial Review of Administrative Action* 179.

<sup>62</sup> The position has significantly changed since Hogg *Liability of the Crown* 139 remarked with reference to government contracts: “In the United Kingdom ... this area for research has barely been entered.” See eg Arrowsmith *Civil Liability and Public*

The traditional absence of a distinct administrative law treatment of state commercial activity in English law is of particular relevance to this study given the strong influence of that system on the development of South African public law. In the light of the shared common law basis of English and South African administrative law, comparative references to significant developments in the former system is particularly useful as examples of the potential treatment of current trends in a familiar conceptual environment.

### 4.3.2 German legal system

#### 4.3.2.1 Institutional structures

The Federal Republic of Germany is a *Rechtsstaat* based on the supreme *Grundgesetz* (GG) or Basic Law.<sup>63</sup> The legislative, executive and judicial branches of government are subject to the GG and the *Bundesverfassungsgericht* (Federal Constitutional Court) has the power to enforce the GG by reviewing all state action for compliance with it.<sup>64</sup> Although the GG provides for a definite separation of state powers<sup>65</sup> this separation is not absolute.<sup>66</sup> Parliament, for example, elects the head of the federal government, the Chancellor.<sup>67</sup> The Chancellor in turn selects federal ministers<sup>68</sup> who may be members of Parliament.<sup>69</sup> Germany is a federal state

---

*Authorities*, (1995) 111 *LQR* 235, (1994) 53 *Cambridge LJ* 104, (1992) 1 *Public Procurement LR* 92, (1990) 106 *LQR* 277, (1990) 10 *Legal Studies* 231; Davies in Freedland & Auby (eds) *The Public Law/Private Law Divide* 113; Freedland in Craig & Rawlings (eds) *Law and Administration in Europe* 123; Daintith in Jowell & Oliver (eds) *The Changing Constitution* 193; Harden *The Contracting State*; Arrowsmith, Linarelli & Wallace *Regulating Public Procurement*; Bailey 2007 *Public Law* 444, (2005) 14 *Public Procurement LR* 291; Davies (2006) 122 *LQR* 98; Freedland 1994 *Public Law* 86; Daintith (1979) 32 *Current Legal Problems* 41.

<sup>63</sup> Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 34 – 38.

<sup>64</sup> Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 34 – 37.

<sup>65</sup> Article 20(2).

<sup>66</sup> Singh *German Administrative Law in Common Law Perspective* 15.

<sup>67</sup> GG article 63.

<sup>68</sup> GG article 64.

<sup>69</sup> Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 117; Youngs *English, French & German Comparative Law* 9.

with state power divided between the federal government and the states (*Länder*).<sup>70</sup>

Legislative authority at federal level rests in the hands of the *Bundestag* (Lower House of the Federal Parliament) and *Bundesrat* (Upper House of the Federal Parliament).<sup>71</sup> The former is directly elected by popular vote, while the latter consists of representatives appointed by the respective *Länder* governments.<sup>72</sup> Each *Land* has its own parliament with legislative authority for that state,<sup>73</sup> but federal legislation generally prevails over that of *Länder*.<sup>74</sup> There are also functional divisions of legislative authority between national and *Länder* levels.<sup>75</sup>

The head of state, the *Bundespräsident*, is elected by the Federal Assembly consisting of members of the *Bundestag* and *Bundesrat*.<sup>76</sup> The *Bundespräsident* is, however, a ceremonial head of state with the Chancellor functioning as executive head of government.<sup>77</sup> As noted above, the Chancellor is elected by the *Bundestag* who in turn selects the federal ministers to be appointed by the *Bundespräsident* to form the federal executive. The Chancellor and ministers, collectively the *Bundeskabinett*, answer to the *Bundestag* and only remain in power as long as they retain the confidence of the *Bundestag*.<sup>78</sup> Although the primary legislative authority rests at federal level, the implementation of legislation is mostly done at *Länder* level by *Länder* executives and the powers of the *Länder* in this regard

---

<sup>70</sup> GG article 20.

<sup>71</sup> Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 117; Youngs *English, French & German Comparative Law* 19.

<sup>72</sup> GG articles 20, 38, 51; Youngs *English, French & German Comparative Law* 19.

<sup>73</sup> The respective legislative competencies of the federal and *Länder* parliaments are set out in articles 70 – 77 of the GG.

<sup>74</sup> GG article 31.

<sup>75</sup> Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 75 – 80.

<sup>76</sup> GG article 54.

<sup>77</sup> Youngs *English, French & German Comparative Law* 19; Foster *German Legal System & Laws* 32.

<sup>78</sup> Article 67 of the GG provides for a vote of no confidence in the Chancellor, which, if passed, will result in the dismissal of the entire *Bundeskabinett*.

are protected in the GG.<sup>79</sup> From an administrative law point of view, the *Länder* administration is therefore of primary importance.

The most dramatic institutional difference between the English legal system and the German one lies in judicial authority. In contrast to the single general jurisdiction of the English judicial system, the German one consists of a considerable number of specialised courts each with its own, exclusive jurisdiction. The “highest” court is the *Bundesverfassungsgericht*. Its jurisdiction is, however, limited to constitutional questions and a limited number of public law disputes.<sup>80</sup> At federal level there are furthermore the *Bundesverwaltungsgericht* (Federal Administrative Court), *Bundesarbeitsgericht* (Federal Labour Court), *Bundesfinanzhof* (Federal Finance Court), *Bundessozialgericht* (Federal Social Court) and *Bundesgerichtshof* (Federal Court of Justice).<sup>81</sup> These are all final courts of appeal in their respective jurisdictions with trial and intermediate appeal courts in each jurisdiction at *Länder* level.<sup>82</sup> Of particular relevance in this study is the basic jurisdictional distinction between the *Bundesverwaltungsgericht* that hears administrative law matters and the *Bundesgerichtshof* that hears contractual matters.

Apart from the GG German law consists of a number of codifications of law in stark contrast to the uncodified nature of English common law. Among these are the *Bürgerliches Gesetzbuch* (Civil Code), the most prominent source of German private law, the *Handelsgesetzbuch* (Commercial Code), containing the basic rules of commercial law and the *Verwaltungsverfahrensgesetz* (Administrative Proceedings Act), which contains the essential administrative law procedures and related substantive provisions.

---

<sup>79</sup> GG articles 30, 83 – 85, also see the similar protection of local government powers in article 28. Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 115; Schwarze *European Administrative Law* 126.

<sup>80</sup> Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 10.

<sup>81</sup> GG article 95.

<sup>82</sup> See Youngs *English, French & German Comparative Law* 66 – 82; Singh *German Administrative Law in Common Law Perspective* 183 – 184.

#### 4.3.2.2 General principles

In line with the *Rechtsstaat* concept and central to the German legal system all state action must conform with the GG and can be tested as such by the *Bundesverfassungsgericht*. In addition to the institutional provisions noted above, the GG contains a number of guaranteed and justiciable fundamental rights.<sup>83</sup> Noteworthy are the economic liberties contained in the GG,<sup>84</sup> some of which touch directly on state commercial activity. Kommers notes the apparent tension between provisions in the GG that sanction state participation in the economy<sup>85</sup> and those that protect economic liberties of individuals.<sup>86</sup> For present purposes it is sufficient to note the role of these provisions in bringing state commercial activity within the realm of mainstream German constitutional jurisprudence.

The approach to fundamental rights in the GG also has a determinative influence on the general judicial control of state action in German law. Administrative law is inextricably linked to the constitutional protection of fundamental rights in that the judicial power of review is based on article 19 of the GG, which guarantees every individual the right to approach a court for redress where his or her rights are violated by public authorities.<sup>87</sup> Apart from the express rights contained in the GG a number of further principles are said to flow from it that constrain state action. These include the principle of legality, which requires all state action to be authorised by and in line with statutory law,<sup>88</sup> and proportionality (*Verhältnismäßigkeit*), which requires a

---

<sup>83</sup> GG articles 1 – 19.

<sup>84</sup> See Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 241 – 297.

<sup>85</sup> GG articles 15, 110, 134 and 135.

<sup>86</sup> GG articles 2, 12 and 14; Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 247.

<sup>87</sup> Schwarze *European Administrative Law* 114 – 117, 122 – 124; Singh *German Administrative Law in Common Law Perspective* 12 – 13, 120, 123; Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 37.

<sup>88</sup> Singh *German Administrative Law in Common Law Perspective* 12, 127 – 133.



relationship of necessity, suitability and balance between action and purpose.<sup>89</sup>

There is a strong distinction between private and public law in the German system. Not only are there significant theoretical differences and distinct substantive legal rules between the public and private spheres, but there are also separate judicial jurisdictions.<sup>90</sup> Private law disputes are mostly dealt with in the *BGH*, while most public law disputes, excluding direct constitutional matters,<sup>91</sup> are ultimately adjudicated by the *Bundesverwaltungsgericht* and the lower specialised administrative courts.<sup>92</sup> It is important to note that these administrative courts are fully fledged courts and part of the judicial branch of government like any other German court and not administrative tribunals, which in many other systems form part of the executive branch of government.<sup>93</sup> The jurisdictional distinctions between the various German courts are, however, not watertight. Since German administrative law has a strong constitutional basis, as noted above, the *Bundesverfassungsgericht* also has considerable influence on administrative law questions where such issues are directly linked to constitutional

---

<sup>89</sup> Singh *German Administrative Law in Common Law Perspective* 13, 160 – 167; Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 46; Lange *Unreasonableness as a Ground of Judicial Review in South Africa* 59 – 63.

<sup>90</sup> Singh *German Administrative Law in Common Law Perspective* 8; Schwarze *European Administrative Law* 122.

<sup>91</sup> These are dealt with in the *BVerfG*, see par 4.3.2.1 above. See Singh *German Administrative Law in Common Law Perspective* 200 and Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 10 – 15 for the criteria used to identify such constitutional disputes.

<sup>92</sup> Below the *BVerwG* are the *Verwaltungsgerichte* at the lowest level and the *OVG* or *Verwaltungsgerichtshof* at intermediate level. Only the *BVerwG* functions at federal level, the other administrative courts all function at *Länder* level. Singh *German Administrative Law in Common Law Perspective* 183 – 206; Schwarze *European Administrative Law* 122 – 123.

<sup>93</sup> Examples of such tribunals are the *Conseil d'Etat* in France, the Administrative Appeals Tribunal in Australia and the Financial Services and Markets Tribunal in England. See Wade & Forsyth *Administrative Law* 951 – 960 for an extensive list of tribunals in England and also De Smith, Woolf & Jowell *Judicial Review of Administrative Action* 33 – 36. Singh *German Administrative Law in Common Law Perspective* 183 – 184.

disputes.<sup>94</sup> A number of other matters, notably compensation for expropriation and for wrongs of public authorities, which may be viewed as administrative law matters, are expressly excluded from the jurisdiction of the administrative courts and placed under the jurisdiction of the *Bundesgerichtshof*.<sup>95</sup> Given the practical necessity of distinguishing between private and public law, German law has developed significant jurisprudence and scholarship on theories and factors influencing this distinction.<sup>96</sup> It is sufficient to note here that in terms of these theories it is perfectly possible for public bodies to act in a private capacity and for those actions to be regulated by private law akin to any individual.<sup>97</sup> A prime example of such private action of public authorities is the commercial contract. Public bodies may enter into such private commercial contracts like any other market actor and those actions will be regulated by the relevant provisions of the *BGB* as would the actions of any other private actor.<sup>98</sup> However, German law significantly diverges from English law in that it recognizes the legal concept of an administrative contract (*öffentlichrechtlicher Vertrag* or *verwaltungsrechtlicher Vertrag*).<sup>99</sup> The substantive legal rules governing private and administrative

---

<sup>94</sup> Schwarze *European Administrative Law* 119, 124 – 125.

<sup>95</sup> *Verwaltungsgerichtsordnung* article 40(2) and GG articles 14(3) and 34; Singh *German Administrative Law in Common Law Perspective* 197; Schwarze *European Administrative Law* 119, 124.

<sup>96</sup> See Ehlers in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 119 *et seq*; Singh *German Administrative Law in Common Law Perspective* 8 – 10, 197 – 206; Floyd *Die Owerheidsooreenkoms – 'n Administratiefregtelike Ondersoek* 72 – 83.

<sup>97</sup> Ehlers in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 119 *et seq*; Gurlit in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 692 *et seq*; Singh *German Administrative Law in Common Law Perspective* 197 – 198, 103 – 107; Grziwotz *Vertragsgestaltung im Öffentlichen Recht* 26.

<sup>98</sup> Ehlers in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 130, 136, 140 – 141; Remmert in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 522 – 523; Gurlit in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 698 *et seq*; Stelkens *Verwaltungsprivatrecht* 57 *et seq*; Singh *German Administrative Law in Common Law Perspective* 94; Floyd *Die Owerheidsooreenkoms – 'n Administratiefregtelike Ondersoek* 84 – 104.

<sup>99</sup> See Gurlit in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 685 *et seq*; Ziekow & Siegel (2003) 94 *VerwArch* 593, (2004) 95 *VerwArch* 133, (2004) 95 *VerwArch* 281, (2004) 95

contracts differ; the former is subject to the jurisdiction of the *Bundesgerichtshof* while the latter is subject to the *Bundesverwaltungsgericht*.<sup>100</sup> An important feature of the German administrative contract, distinguishing it from the position in France, is that the legal rules applicable to such contracts have been largely codified in the *VwVfG*.<sup>101</sup> However, the German administrative contract plays a limited role in facilitating state commercial activity vis-à-vis traditional private law contracts.<sup>102</sup> It is generally accepted in German law that private law applies, exclusively or in large part, to state conduct in “Leistungsverwaltung ... Bedarfsdeckung ... Vermögensverwaltung ... [and as] Teilnehmer am Wirtschaftsleben”.<sup>103</sup> Although the two forms of contract therefore exist alongside one another, German law seems to have developed specific functions or usage for each form.

In German law significant attention has been given from a public law perspective to state participation in the private market. It provides one with important theoretical analyses of the public/private law divide and the implications of that theoretical construction for the present investigation. The legal concept of an administrative contract with a particular use furthermore provides one from a South African perspective with a noteworthy alternative approach to regulating state commercial activity. The significant influence of

---

*VerwArch* 573; Singh *German Administrative Law in Common Law Perspective* 94; Floyd *Die Owerheidsooreenkoms – ‘n Administratiefregtelike Ondersoek* 104 – 141.

<sup>100</sup> Ehlers in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 120; Gurlit in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 698 *et seq*; Grziwotz *Vertragsgestaltung im Öffentlichen Recht* 34 – 37; Singh *German Administrative Law in Common Law Perspective* 94, 197.

<sup>101</sup> Articles 54 – 62; Singh *German Administrative Law in Common Law Perspective* 94.

<sup>102</sup> Ehlers in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 130, 136, 140 – 141; Gurlit in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 698 *et seq*; Turpin in Von Mehren (ed) *International Encyclopedia of Comparative Law Volume VII Contracts in General* 30 – 31.

<sup>103</sup> Ehlers in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 150 – 152 (administration of services, fulfilment of the state’s material needs, administration of public assets and as participant in commercial life (my translation)); Grziwotz *Vertragsgestaltung im Öffentlichen Recht* 26.

German constitutional and administrative law on the new constitutional regime in South Africa means that German analyses of state commercial activity within a constitutional framework provide useful comparative insights to an assessment of state commercial activity in South African law.

### 4.3.3 French legal system

#### 4.3.3.1 Institutional structures

The foundational principle of the French constitutional system is that of *l'état de droit* ("state of law").<sup>104</sup> The written Constitution is the supreme law and a constitutional court, the *Conseil Constitutionnel*, guards compliance with it.<sup>105</sup> This role of the *Conseil Constitutionnel* is, however, limited in the sense that only a small category of applicants have access to it<sup>106</sup> and it can only pronounce on the constitutional validity of legislation prior to its promulgation.<sup>107</sup> The *Conseil d'Etat*, France's highest administrative court, may also enforce the supremacy of the Constitution by declaring governmental action unconstitutional.<sup>108</sup> The French Constitution of 1958 ("the 1958 Constitution") incorporates a number of principles from previous regimes, particularly civil liberties, by reference to the 1789 Declaration of the Rights of Man and the Preamble of the Constitution of 1946.<sup>109</sup> The 1958 Constitution provides for separation of powers between the various branches of government, but the separation of legislative, executive and judicial

---

<sup>104</sup> West *et al The French Legal System* 158; Schwarze *European Administrative Law* 100.

<sup>105</sup> West *et al The French Legal System* 158 – 162; Brown & Bell *French Administrative Law* 14.

<sup>106</sup> Only the President of the Republic, the Prime Minister, the president of either house of Parliament or sixty members of either house of Parliament may refer a statute to the *Conseil Constitutionnel*: West *et al The French Legal System* 160; Brown & Bell *French Administrative Law* 15; Baranger in Craig & Tomkins (eds) *The Executive and Public Law* 228.

<sup>107</sup> West *et al The French Legal System* 160 – 162; Brown & Bell *French Administrative Law* 14.

<sup>108</sup> Brown & Bell *French Administrative Law* 13; Baranger in Craig & Tomkins (eds) *The Executive and Public Law* 236 – 237; Schwarze *European Administrative Law* 103.

<sup>109</sup> Preamble of the 1958 Constitution (translation Bell *French Constitutional Law* 245); West *et al The French Legal System* 43; Schwarze *European Administrative Law* 104.

functions is not clear or absolute.<sup>110</sup> Both Parliament and the executive have legislative functions.<sup>111</sup> The *Conseil d'Etat*, apart from being the final administrative court, also has administrative functions<sup>112</sup> and the Prime Minister is its nominal head.<sup>113</sup>

Parliament consists of two houses, the *Sénate* (Upper House) and the *Assemblée Nationale* (Lower House), with the latter directly elected by popular vote.<sup>114</sup> An important feature of the French system is that Parliament's legislative powers are limited to those matters listed in article 34 of the 1958 Constitution.<sup>115</sup> In all other matters article 37 of the 1958 Constitution empowers the executive to legislate by means of *réglements*.<sup>116</sup> Furthermore, Parliament may grant the executive the authority to legislate by *ordonnance* in matters within Parliament's article 34 powers for a limited time and subject to such *ordonnances* being ratified by Parliament.<sup>117</sup> These *ordonnances* are made by the Council of Ministers on the advice of the *Conseil d'Etat*.<sup>118</sup> Parliament remains the primary, if limited, legislative power in France through its article 34 powers and the executive's article 37

---

<sup>110</sup> West *et al* *The French Legal System* 141 – 142; Brown & Bell *French Administrative Law* 9 – 14; Baranger in Craig & Tomkins (eds) *The Executive and Public Law* 227.

<sup>111</sup> 1958 Constitution, articles 34, 37, 38 (translation Bell *French Constitutional Law* 252, 253); West *et al* *The French Legal System* 142 – 145; Brown & Bell *French Administrative Law* 11.

<sup>112</sup> West *et al* *The French Legal System* 88, 90 – 93; Brown & Bell *French Administrative Law* 62 – 79; Schwarze *European Administrative Law* 101.

<sup>113</sup> West *et al* *The French Legal System* 92.

<sup>114</sup> 1958 Constitution, article 24 (translation Bell *French Constitutional Law* 250); West *et al* *The French Legal System* 143.

<sup>115</sup> West *et al* *The French Legal System* 143; Brown & Bell *French Administrative Law* 11; Baranger in Craig & Tomkins (eds) *The Executive and Public Law* 229.

<sup>116</sup> West *et al* *The French Legal System* 46, 143 – 145; Brown & Bell *French Administrative Law* 11; Baranger in Craig & Tomkins (eds) *The Executive and Public Law* 229.

<sup>117</sup> 1958 Constitution, article 38 (translation Bell *French Constitutional Law* 253); West *et al* *The French Legal System* 144, 166 – 167; Brown & Bell *French Administrative Law* 11.

<sup>118</sup> 1958 Constitution, article 38 (translation Bell *French Constitutional Law* 253); West *et al* *The French Legal System* 45.

legislative powers have proven to be of limited use.<sup>119</sup> However, it is quite common for Parliament to enact only broad frameworks in statutes (*lois*) in terms of article 34 and grant wide discretionary powers to the executive to flesh out those frameworks in subordinate legislation or to grant the executive the authority to legislate by means of *ordonnances* in terms of article 38, subject to Parliamentary supervision.<sup>120</sup>

At the head of the French Republic is the President, who is directly elected by popular vote.<sup>121</sup> Although the President is not the head of government, that function being fulfilled by the Prime Minister, he is not a ceremonial head of state similar to the heads of state in England and Germany either. The French President is seen as the active guardian of the Constitution and supervises the effective functioning of the state.<sup>122</sup> In this role the President has a number of important executive functions and powers. He appoints the Prime Minister,<sup>123</sup> who is the head of government.<sup>124</sup> It is generally accepted that the Prime Minister cannot remain in power without the confidence of the President.<sup>125</sup> The President also appoints the ministers on the recommendation of the Prime Minister<sup>126</sup> and he chairs the Council of Ministers, the central executive body.<sup>127</sup> The Prime Minister and ministers may be, but are not necessarily, appointed from Parliament<sup>128</sup> and if they are,

---

<sup>119</sup> West *et al* *The French Legal System* 46, 143, 157; Brown & Bell *French Administrative Law* 11.

<sup>120</sup> Bell *French Constitutional Law* 103; West *et al* *The French Legal System* 166; Brown & Bell *French Administrative Law* 12.

<sup>121</sup> 1958 Constitution, articles 5, 6 (translation Bell *French Constitutional Law* 246); Schwarze *European Administrative Law* 103.

<sup>122</sup> 1958 Constitution, article 5 (translation Bell *French Constitutional Law* 246); Baranger in Craig & Tomkins (eds) *The Executive and Public Law* 226 – 227; West *et al* *The French Legal System* 146.

<sup>123</sup> 1958 Constitution, article 8 (translation Bell *French Constitutional Law* 247).

<sup>124</sup> 1958 Constitution, article 21 (translation Bell *French Constitutional Law* 249 – 250).

<sup>125</sup> West *et al* *The French Legal System* 146.

<sup>126</sup> 1958 Constitution, article 8 (translation Bell *French Constitutional Law* 247).

<sup>127</sup> 1958 Constitution, article 9 (translation Bell *French Constitutional Law* 247).

<sup>128</sup> West *et al* *The French Legal System* 144.

they cease to be members of Parliament.<sup>129</sup> It is not uncommon for senior administrators to be appointed to the Council of Ministers.<sup>130</sup>

Like that of Germany, and in contrast to the English system, the judicial authority in France is exercised by separate functional jurisdictions.<sup>131</sup> The supervisory role of the *Conseil Constitutionnel* in enforcing the Constitution has already been mentioned above. Of central importance in the context of this study is the unique French institution of the *Conseil d'Etat*. This body stands at the apex of an administrative jurisdiction separate from the “ordinary” civil courts.<sup>132</sup> As noted above, the *Conseil d'Etat* also fulfils various administrative functions in advising the government on draft legislation and other governmental functions.<sup>133</sup> It is divided into one judicial and five administrative divisions, but there is significant interaction between the various divisions so that the *Conseil d'Etat's* judicial functions are not exercised in isolation from its administrative functions.<sup>134</sup> Conflict between the various jurisdictions is resolved by a special body, the *Tribunal des Conflits*.<sup>135</sup>

French law consists in the main part of legislation ranging from the Constitution to executive *ordonnances*.<sup>136</sup> It was also the pioneer of Continental codification, with the most important code being the *Code Civil* of 1804, codifying much of French private law.<sup>137</sup> However, most recent codes

---

<sup>129</sup> 1958 Constitution, article 23 (translation Bell *French Constitutional Law* 250).

<sup>130</sup> Brown & Bell *French Administrative Law* 26.

<sup>131</sup> West *et al The French Legal System* 73 – 76; Brown & Bell *French Administrative Law* 44.

<sup>132</sup> The ordinary civil jurisdiction consists of a large number of courts at various levels with the *Cour de Cassation* at its apex: West *et al The French Legal System* 76 – 88; Brown & Bell *French Administrative Law* chapters 3, 4, 6; Baranger in Craig & Tomkins (eds) *The Executive and Public Law* 229.

<sup>133</sup> West *et al The French Legal System* 90 – 91; Brown & Bell *French Administrative Law* 64 – 75; Baranger in Craig & Tomkins (eds) *The Executive and Public Law* 230.

<sup>134</sup> West *et al The French Legal System* 92 – 93; Brown & Bell *French Administrative Law* 80 – 81.

<sup>135</sup> West *et al The French Legal System* 93 – 94; Brown & Bell *French Administrative Law* 149 – 154.

<sup>136</sup> West *et al The French Legal System* 42 – 49.

<sup>137</sup> West *et al The French Legal System* 49; Brown & Bell *French Administrative Law* 2.

are simply compilations of various statutory texts, including the *Code Administratif*, which is no more than a collection of legislation on administrative topics.<sup>138</sup> French administrative law is for the most part uncodified and the creation of judicial pronouncement, especially by the *Conseil d'Etat*.<sup>139</sup>

#### 4.3.3.2 General principles

Legality is a central principle of French law flowing from the foundational doctrine of *l'état de droit*.<sup>140</sup> It conveys the basic notion that public power is held by legal authority and must be exercised in accordance with such authorisation and all other applicable law.<sup>141</sup> In reviewing government action under the rubric of legality especially the *Conseil d'Etat* has developed French administrative law around general principles such as equality, freedom<sup>142</sup> and procedural entitlements.<sup>143</sup> In this development French courts have often relied on the general liberties contained in the 1789 Declaration of the Rights of Man and the Preamble to the 1946 Constitution, both of which are incorporated by reference in the 1958 Constitution, as noted above.<sup>144</sup> Control of government action by the *Conseil d'Etat*, however, goes further than simply the protection of individual rights and also focuses on principles of

---

<sup>138</sup> West *et al The French Legal System* 49; Brown & Bell *French Administrative Law* 2.

<sup>139</sup> West *et al The French Legal System* 54; Brown & Bell *French Administrative Law* 2, 175 – 176.

<sup>140</sup> West *et al The French Legal System* 158; Baranger in Craig & Tomkins (eds) *The Executive and Public Law* 233 *et seq.*

<sup>141</sup> West *et al The French Legal System* 158, 168; Brown & Bell *French Administrative Law* 214 – 216; Baranger in Craig & Tomkins (eds) *The Executive and Public Law* 235.

<sup>142</sup> An interesting application of this principle in the form of freedom of enterprise is the *Conseil d'Etat*'s ruling that it prohibits the public service from competing with the private sector: Bell *French Constitutional Law* 187.

<sup>143</sup> West *et al The French Legal System* 52 – 53, 164 – 165; Brown & Bell *French Administrative Law* 216 – 220; Schwarze *European Administrative Law* 106, 110, 113; Mitchell *The Contracts of Public Authorities* 166.

<sup>144</sup> West *et al The French Legal System* 53; Brown & Bell *French Administrative Law* 218 – 219.



good governance and co-operative administration.<sup>145</sup> In terms of the principle of legality the administrative courts have the power to set aside governmental action.<sup>146</sup>

French law traditionally maintains a strict distinction between private and public law.<sup>147</sup> This is borne out not only by distinct substantive rules of law, but also separate court systems, as noted above. The *Conseil Constitutionnel* has ruled that the distinction between private and public law courts is a fundamental constitutional principle in French law.<sup>148</sup> This principle is so strong in French law that the Law of 16 – 24 August 1790 declared it a criminal offence for judges of the civil courts to probe the functions of administrators.<sup>149</sup> Similar to the German position it is thus of particular practical importance to distinguish between matters of private and public (particularly administrative) law. Considerable scholarship addressing this question has consequently developed in French law.<sup>150</sup> The conventional approach of the French courts was established in the judgement of the *Tribunal des Conflits* in *Blanco*.<sup>151</sup> In terms of this approach all activity aimed at public service was said to fall within the administrative law jurisdiction.<sup>152</sup> The two elements of *service public* is “activity of a public authority, and the satisfying thereby of a public need.”<sup>153</sup> An important consequence of this approach is that not all activities of public authorities thus qualify as administrative action that is subject to the administrative courts. Courts

---

<sup>145</sup> West *et al* *The French Legal System* 168; Schwarze *European Administrative Law* 106.

<sup>146</sup> West *et al* *The French Legal System* 171, 313; Brown & Bell *French Administrative Law* 20.

<sup>147</sup> West *et al* *The French Legal System* 24.

<sup>148</sup> Bell *French Constitutional Law* 71; Brown & Bell *French Administrative Law* 20, 128.

<sup>149</sup> Brown & Bell *French Administrative Law* 127 – 128; Schwarze *European Administrative Law* 100.

<sup>150</sup> See Brown & Bell *French Administrative Law* 126 – 156; West *et al* *The French Legal System* 24 – 27; Schwarze *European Administrative Law* 101 – 102.

<sup>151</sup> *Blanco*, *Tribunal des Conflits* 8 February 1873; Brown & Bell *French Administrative Law* 129; West *et al* *The French Legal System* 74 – 75; Schwarze *European Administrative Law* 101 – 102.

<sup>152</sup> Brown & Bell *French Administrative Law* 129; West *et al* *The French Legal System* 75.

<sup>153</sup> Brown & Bell *French Administrative Law* 130.

increasingly adopted the view that commercial activity of public bodies did not satisfy a public need and accordingly did not qualify as administrative action, but was subject to normal private law rules.<sup>154</sup> No categorical answer could, however, be given to the classification of state contracts so that jurisdiction could only be determined on a case by case basis.<sup>155</sup> This resulted in the development of distinct rules regarding state contracts in the administrative and civil courts respectively.<sup>156</sup> French law consequently pioneered the administrative contract (*contrat administratif*) as a legal notion distinct from private law contracts (*contrats de droit privé*).<sup>157</sup> As a further result of the development of these distinct legal notions a complex jurisprudence developed in French law regarding the distinction between them.<sup>158</sup> The criteria used to distinguish between the two forms of contract is of such a nature that it is generally possible for a public body to choose whether it wants to enter into an administrative contract or a private law contract.<sup>159</sup>

In the light of the complex jurisprudence in French law regarding the distinction between *contrats administratifs* and *contrats de droit privé* the treatment of state commercial activity in that system is particularly relevant to an investigation into the theoretical constructions underlying many of the problems experienced in South African law in this regard.

---

<sup>154</sup> Brown & Bell *French Administrative Law* 133, 141 – 143; West *et al The French Legal System* 75.

<sup>155</sup> Brown & Bell *French Administrative Law* 141; West *et al The French Legal System* 75.

<sup>156</sup> Brown & Bell *French Administrative Law* 141, 202 *et seq*; Mitchell *The Contracts of Public Authorities* 165, 171.

<sup>157</sup> Mitchell *The Contracts of Public Authorities* 167 *et seq*; Turpin in Von Mehren (ed) *International Encyclopedia of Comparative Law Volume VII Contracts in General* 27.

<sup>158</sup> Brown & Bell *French Administrative Law* 141 – 143, 202; Mitchell *The Contracts of Public Authorities* 171 *et seq*; Turpin in Von Mehren (ed) *International Encyclopedia of Comparative Law Volume VII Contracts in General* 28 – 29.

<sup>159</sup> Brown & Bell *French Administrative Law* 143; Mitchell *The Contracts of Public Authorities* 170; Turpin in Von Mehren (ed) *International Encyclopedia of Comparative Law Volume VII Contracts in General* 28; Arnould (2001) 10 *Public Procurement LR* 324 at 335; Martin (1997) 6 *Public Procurement LR* CS166.

## 5 Terminology

### 5.1 “State”

The term “state” is a particularly vague one of which the exact meaning depends in a large measure on the context in which it is used.<sup>160</sup> The term can also not be separated from theories of the state and statehood and the historical development and use of the term should be understood in terms of the development of such theories. The term originated in the Latin term *status* where it conveyed a predominantly proprietary meaning referring to the estate of a sovereign prince including the rights and powers attached to that estate.<sup>161</sup> From this original meaning it evolved to refer to the sovereign power and by the thirteenth century it included persons of authority, their property and their authority.<sup>162</sup> During the Renaissance the ideal form of state was continuously debated and by the end of this period the term came to include the idea of “apparatus of government distinct from those who happen to have control of it.”<sup>163</sup> Machiavelli thus defined the state as “an effectively sovereign government.”<sup>164</sup> Renaissance thinkers equated the state with its citizens and it was Hobbes who developed the term further to refer to an impersonal political authority distinct from the governors of the day as well as

---

<sup>160</sup> To critical scholars this will off course sound like a truism, applicable to all words and terms. I do not wish to refute the insights of the interpretive turn or claim that other words or terms have exact, clear meanings independent of context. I merely wish to emphasise the evidently contextual nature of the word “state,” which is therefore perhaps one of the best (and uncontroversial) examples of the contextual and indeterminate nature of (legal) terms.

<sup>161</sup> Baxter (1982) 99 *SALJ* 212 at 217; Dowdall (1923) 39 *LQR* 98 at 102; Dyson *The State Tradition in Western Europe* 25 – 26.

<sup>162</sup> Baxter (1982) 99 *SALJ* 212 at 217; Wiechers *Verloren van Themaat Staatsreg* 5; Dowdall (1923) 39 *LQR* 98 at 103 – 109; Dyson *The State Tradition in Western Europe* 25 – 26.

<sup>163</sup> The term was thus in addition used as a verb: Baxter (1982) 99 *SALJ* 212 at 217; Loughlin in Sunkin & Payne (eds) *The Nature of the Crown* 41 – 42.

<sup>164</sup> Baxter (1982) 99 *SALJ* 212 at 217; Dowdall (1923) 39 *LQR* 98 at 109 – 111, 115 views Machiavelli as the founder of “the modern science of the state” because of his original use of the term “state” for “every form of government which exercises *imperio sopra gli uomini*.”

the governed.<sup>165</sup> Various social-political factors in Continental Europe and accompanying theories contributed to the development of the term “state” divorced from a patrimonial, personalised concept to an abstract notion of legal personality.<sup>166</sup> These same factors led to the term being used to refer to entire countries as entities in addition to the governing authorities of those entities.<sup>167</sup>

The emergence of the modern state led to the scientific study of the concept and its use as a tool of analysis in various disciplines<sup>168</sup> so that varying definitions of the term emerged from these various fields of study. Dyson puts forward the following (somewhat convoluted) definition of the state, which, he argues, captures “the three aspects of the state,” namely legal, political and sociological:

Besides referring to an entity or actor in the arena of international politics, state is a highly generalizing, integrating and legitimating concept that identifies the leading values of the political community with reference to which authority is to be exercised; emphasizes the distinctive character and unity of the ‘public power’ compared with civil society; focuses on the need for depersonalization of the exercise of that power; finds its embodiment in one or more institutions and one or more public purposes which thereby acquire a special ethos and prestige and an association with the public interest or general welfare; and produces a socio-cultural awareness of (and sometimes dissociation from) the unique and superior nature of the state itself.<sup>169</sup>

---

<sup>165</sup> Loughlin in Sunkin & Payne (eds) *The Nature of the Crown* 41 – 42; see also Hall in McLennan, Held & Hall (eds) *The Idea of the Modern State* 14, 24 and Held in McLennan, Held & Hall (eds) *The Idea of the Modern State* 30, 32 *et seq.*

<sup>166</sup> Baxter (1982) 99 *SALJ* 212 at 218 – 220; Dyson *The State Tradition in Western Europe* 27 – 33, 135 – 143.

<sup>167</sup> Baxter (1982) 99 *SALJ* 212 at 217; Dowdall (1923) 39 *LQR* 98 at 115 – 124; Dyson *The State Tradition in Western Europe* 27 – 33.

<sup>168</sup> Dyson *The State Tradition in Western Europe* 9, 81, 150.

<sup>169</sup> Dyson *The State Tradition in Western Europe* 206.

Represented in this definition are views of the state in international law (and politics) of a sovereign community within a defined territory; in political science of the character of organised public power; in sociology of a community of human beings exercising coercive power and in law generally of a legal entity consisting of various organs with a distinct existence.<sup>170</sup>

In legal discourse the word “state” similarly conveys different ideas as used in different contexts so that no single *legal* definition of the term can be identified. Among these different ideas are:<sup>171</sup>

- The persons or institutions that wield public power or a specific subset of such persons, such as the government, the executive or the administration. The term in this sense refers to the organised public authority as used in contexts such as criminal prosecutions and taxation;
- A specified territory such as when one refers to the borders of the state or the extent of the state;
- The people residing in a specified territory, for example a multilingual state or homogeneous state;
- A sovereign or independent political entity as used in international law;
- The legal system, such as when one refers to a common-law state or a constitutional state;
- A juristic person that owns property and engages in commercial activity.

Baxter effectively illustrates the varied use of the word “state” in South African law, especially in legislation.<sup>172</sup> With reference to the 1961 Constitution,<sup>173</sup> he

---

<sup>170</sup> Dyson *The State Tradition in Western Europe* 206; see also Boule, Harris & Hoexter *Constitutional and Administrative Law* 1; Currie & De Waal *The New Constitutional and Administrative Law Volume I Constitutional Law* 4.

<sup>171</sup> See Wiechers *Verloren van Themaat Staatsreg* 5 – 6; Rautenbach & Malherbe *Constitutional Law* 1; Baxter (1982) 99 SALJ 212 at 223 – 234.

<sup>172</sup> Baxter (1982) 99 SALJ 212.

describes the use of the term as schizophrenic.<sup>174</sup> He also notes the inconsistent use of “state” in relation to other terms such as “Republic (of South Africa)”, “government”, “administration” and “South Africa.”<sup>175</sup> Although he identifies two meanings for “state” as “a rough description” in South African statutory law,<sup>176</sup> he seems to conclude that the meaning of the term is whatever the particular statute or legal context says it is.<sup>177</sup> In this conclusion he is supported by judicial pronouncement on the term “state”.<sup>178</sup>

If one turns to the current Constitution as the foundational document of the South African state, in any of the above meanings, some measure of consistent use of terminology emerges, although there is by no means complete uniformity. The word “Republic”<sup>179</sup> is used to refer to the sovereign political entity known as the “Republic of South Africa” and which is a subject of international law.<sup>180</sup> It also conveys a territorial meaning,<sup>181</sup> although the territorial dimension is sometimes expressly stated in addition to, rather than included in, the term “Republic”.<sup>182</sup> This use of “Republic” is in some instances replaced by the term “South Africa”<sup>183</sup> and in a very limited number

---

<sup>173</sup> Republic of South Africa Constitution Act 32 of 1961.

<sup>174</sup> Baxter (1982) 99 SALJ 212 at 224.

<sup>175</sup> Baxter (1982) 99 SALJ 212 at 224 – 236.

<sup>176</sup> These two meanings are: “(a) the collective wealth (‘estate’) and liabilities of the sovereign territory known as the ‘Republic of South Africa’ which are not owned or owed by private individuals or corporations; and (b) the conglomeration of organs, instruments and institutions which have as their common purpose the ‘management’ of the public affairs, in the public interest, of the residents of the Republic of South Africa as well as those of her citizens abroad in their relations with the South African ‘Government’”: Baxter (1982) 99 SALJ 212 at 225 – 226.

<sup>177</sup> Baxter (1982) 99 SALJ 212 at 223, 236.

<sup>178</sup> *Mateis v Ngwathe Plaaslike Munisipaliteit en Andere* 2003 4 SA 361 (SCA) at par 7.

<sup>179</sup> With or without the addition of “of South Africa”.

<sup>180</sup> See sections 1, 2, 4, 5, 6, 199(5), 231.

<sup>181</sup> See sections 21(3), 224, 231(4), 232, 235.

<sup>182</sup> See sections 151(1) (“the whole of the territory of the Republic”), 200(2) where “territorial integrity” is stated as something apart from and in addition to “the Republic”.

<sup>183</sup> See sections 6(5)(b), 7(1), 185(1)(c), 193(2).

of provisions by the word “state”,<sup>184</sup> but then mostly as part of well-known terms such as “head of state”.<sup>185</sup> The word “state”<sup>186</sup> is mostly used in the Constitution to refer to the governing authority or management of the Republic and in this sense can be understood as a collective noun for the executive and legislative branches of government.<sup>187</sup>

In this study the word “state” has a more restricted meaning. It is used to refer to the governing authority of the Republic of South Africa at national and provincial levels. Local governing authorities are thus expressly excluded. This is done in an attempt to focus the study and to steer clear of specific issues emanating from the federal character of the Republic, which falls beyond the scope of the study. Included in the word “state” as used in this study are both the executive and legislative branches of government, which also include the public administration.<sup>188</sup> Although the legislative branch of government is thus included in the term “state” as used here, it should be appreciated that the focus is predominantly on the executive branch of government, since it is that branch of government that is primarily involved in the daily running of the Republic and hence the branch that for the most part engages in commercial activity.

My choice of the word “state” as label of the subject to be studied here is a deliberate one for the advantages which the apparent and uncontroversial indeterminacy of that term provides. As Dyson succinctly notes: “Its virtue is its uncertainty, for it leaves room for something unexpected to be said.”<sup>189</sup> The objective of my choice is that the “open-textured” quality of the term may

---

<sup>184</sup> See sections 1, 83(a), 84(1).

<sup>185</sup> See sections 83(a), 84(1).

<sup>186</sup> Mostly spelled in under-case.

<sup>187</sup> See for example the obligations placed on the “state” in chapter two of the Constitution.

<sup>188</sup> As Baxter (1982) 99 *SALJ* 212 at 234 – 236 indicates, the term “Administration” is itself an extremely difficult one to define. Here it is simply used to describe all those functionaries through which the national executive effects the day-to-day running of the country, principally the national government departments.

<sup>189</sup> Dyson *The State Tradition in Western Europe* 2.

create the possibility to break through conceptual thinking<sup>190</sup> that may predetermine or restrict the outcome of many of the issues raised in this study.

## 5.2 “Commercial activity”

“Commercial activity” is a broad term that has a varied use in both statutory and case law. It is used in a number of statutory instruments,<sup>191</sup> but only defined in a few of those instances. In the Statistics Act<sup>192</sup> “commercial activity” is equated with “business”. In the notices under the Marine Living Resources Act<sup>193</sup> the term is used to ascribe a particular purpose to identified action, namely “to secure a financial return.” Notices issued under the Financial Intelligence Centre Act<sup>194</sup> use the term to define “transaction.” A “transaction” is hence “an instance of commercial activity”. A “transaction” furthermore consists of an agreement between parties “aimed at a piece of business.” One also finds the term “commercial transaction” in statutes.<sup>195</sup> In regulations under the Local Government: Municipal Finance Management Act<sup>196</sup> the term “commercial transaction” is used to describe a “public-private partnership”. In that context the commercial transaction involves the performance by a private party of a municipal function for or on behalf of a municipality or the acquisition of the management or use of municipal property

---

<sup>190</sup> Dyson *The State Tradition in Western Europe 2*: “[S]tate is not therefore a concept with the sort of definite boundaries that would enable a complete description...”

<sup>191</sup> Statistics Act 6 of 1999 s 1; Road Traffic Management Corporation Act 20 of 1999 s 1; Diplomatic Immunities and Privileges Act 37 of 2001 schedule 1; National Environmental Management: Protected Areas Act 57 of 2003 s 50; GN 172 (GG 24333, 31 January 2003) under the Marine Living Resources Act 18 of 1998; GN 735 (GG 26469, 18 June 2004) under the Financial Intelligence Centre Act 38 of 2001; GN 399 (GG 26187, 26 March 2004) under the National Water Act 36 of 1998; GNR 1240 (GG 25407, 29 August 2003) under the Higher Education Act 101 of 1997.

<sup>192</sup> Act 6 of 1999 s 1.

<sup>193</sup> Act 18 of 1998, GN 172 (GG 24333, 31 January 2003).

<sup>194</sup> Act 38 of 2001, GN 735 (GG 26469, 18 June 2004).

<sup>195</sup> Claassen *Dictionary of Legal Words and Phrases* Volume 1 C-71.

<sup>196</sup> Act 56 of 2003, GNR 309 (GG 27431, 1 April 2005).



for a private party's own commercial purposes at the private party's risk and in return for some benefit.

An important use of the term "commercial transaction" is found in the Foreign States Immunities Act,<sup>197</sup> where the immunity of foreign states to the jurisdiction of South African courts is excluded in instances of "commercial transactions" entered into by the foreign state.<sup>198</sup> The Act continues to define "commercial transactions" in section 4(3) to mean:

- (a) any contract for the supply of services or goods;
  - (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such loan or other transaction or of any other financial obligation; and
  - (c) any other transaction or activity or [sic]<sup>199</sup> a commercial, industrial, financial, professional or other similar character into which a foreign state enters or in which it engages otherwise than in the exercise of sovereign authority,
- but does not include a contract of employment between a foreign state and an individual.

It is difficult to ascribe any general meaning to the term "commercial activity" from these various statutory uses. The most one can say is that "commercial activity" includes, but is not limited to, business transactions, which are agreements aimed at some (financial) gain. It seems furthermore that the term (and its variants) is generally not restricted in statutory use to trade, but extends to other forms of business as well and may thus indicate a broad range of activity in the market place.

---

<sup>197</sup> Act 87 of 1981.

<sup>198</sup> Foreign States Immunities Act 87 of 1981 s 4(1).

<sup>199</sup> This should read "activity of a commercial ... character," the Afrikaans text, which was signed by the President, reads "transaksie of bedrywigheid van 'n kommersiële ... aard."

In case law, one finds similar equations of “commercial activity” with “business” and “trade”.<sup>200</sup> Many judicial pronouncements on “commercial activity” and related terms revolve around the exclusion of such activity from sovereign immunity in international law.<sup>201</sup> Although that exclusion is statutorily defined in South African law,<sup>202</sup> some uncertainty remains, which calls for judicial assessment of the terminology.<sup>203</sup> Both from the statutory definition and case law it is clear that the nature or character of the specific state action rather than its purpose will determine whether that action amounts to “commercial activity” and is thus excluded from sovereign immunity.<sup>204</sup> In *Trendtex Trading Corporation v Central Bank of Nigeria*<sup>205</sup> Lord Denning said in this context: “Nearly every country now engages in commercial activities. It

<sup>200</sup> See *Xatula v Minister of Police, Transkei* 1993 4 SA 344 (TK) at 348; but cf *Benrose Holdings Ltd v Flamingo Laundries and Another* 1978 2 SA 377 (W) at 380 where Le Grange J restricted the meaning of “commercial” to trade, meaning “exchange of goods (whether for money or other goods)” to the exclusion of “business of other kinds”.

<sup>201</sup> Foreign States Immunities Act 87 of 1981 s 4(1); *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* 1980 2 SA 111 (T); *Kafraria Property v Government of the Republic of Zambia* 1980 2 SA 709 (E); *Barker McCormac (Pvt) Ltd v Government of Kenya* 1985 4 SA 197 (ZH); *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 (CA). See generally Dugard *International Law A South African Perspective* 180 – 191.

<sup>202</sup> Foreign States Immunities Act 87 of 1981 s 4(3), quoted in the text accompanying note 198 above.

<sup>203</sup> Dugard *International Law A South African Perspective* 185.

<sup>204</sup> *The Akademik Fyodorov: Government of The Russian Federation and Another v Marine Expeditions Inc* 1996 4 SA 422 (C) at 447; *KJ International and Others v MV Oscar Jupiter (Compania De Navigatie Maritime ‘Romline’ SA and Others Intervening)* 1998 2 SA 130 (D) at 136; *CGM Industrial (Pty) Ltd and Others v KPMG and Others* 1998 3 SA 738 (T) at 744; *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 (CA) at 558 (per Lord Denning MR), 579 (per Shaw LJ): “In coming to this conclusion I should make it clear that I regard the intrinsic nature of a transaction rather than its object as the material consideration in determining whether entering into that transaction is a commercial activity or an exercise of sovereign authority”; Dugard *International Law A South African Perspective* 185.

<sup>205</sup> [1977] QB 529 (CA) at 555.

has its departments of state - or creates its own legal entities - which go into the market places of the world. They charter ships. They buy commodities. They issue letters of credit.” In *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique*<sup>206</sup> Margo J likewise said: “[T]he sovereign who chooses to enter the marketplaces and to engage in trading operations in other countries should be held to his bargains and to his obligations.” And in considering whether sovereign immunity applies in *Kaffraria Property v Government of the Republic of Zambia*<sup>207</sup> Eksteen J noted: “[T]he agreement of carriage ... in the present case appears ... to be the normal commercial agreement of this nature generally entered into between contracting parties in the ordinary course of business.”

The usage of “commercial activity” and “commercial transaction” in case law illustrates that those terms have a very wide scope and are indeed difficult to pin down. It emerges that the nature rather than the purpose of the action is relevant in applying the label “commercial” to it. The requisite nature seems to be of action amounting to participation in the open market in the ordinary course of business and as among any market participants. These include, but are not limited to, transactions such as agreements of purchase and sale, barter, lease, construction and the rendering of services generally, financial transactions of all kinds, issuing or taking up of financial instruments and shares. It may include actions consequential to such transactions such as insurance and shipping. “Commercial activity” is broad enough to extend to the setting up of commercial vehicles such as companies, partnerships and joint ventures. It may also refer to the general running of a commercial undertaking.

While the bulk of the type of state conduct that forms the subject matter of this study is transaction-based and the study accordingly focuses on the social practice of contracting, I deliberately use the term “commercial activity”

---

<sup>206</sup> 1980 2 SA 111 (T) at 120.

<sup>207</sup> 1980 2 SA 709 (E) at 715.

rather than “state contracting”. By using a legal term to describe the social practice that forms the subject matter of the study one runs the risk of prejudging the issue, which the study aims to address, namely how the law should conceptualise and accordingly regulate that social practice. Labeling the subject matter of the study as “state contracting” would already determine the way in which the law treats such activity, namely as a matter of contract. By using the vaguer and legally less significant term of “commercial activity” I hope to avoid such a short-circuiting of the analysis.<sup>208</sup>

One significant exclusion from the definition of “commercial transaction” in the Foreign States Immunities Act<sup>209</sup> is contracts of employment between the state and an individual. In this study employment relationships are likewise excluded from the meaning of “commercial activity” and hence the scope of the study. Such relationships are very specific in character, with public service employment as an even more specialised sub-category,<sup>210</sup> and as such quite distinct from other forms of commercial agreements.<sup>211</sup> As such they are not suitable for generalised analysis of the sort engaged in here.<sup>212</sup> This does not mean that legal developments in the context of public service employment are not relevant from a general state commercial activity perspective. Reference to some developments in public employment law,

---

<sup>208</sup> See the arguments advanced by Freedland in Craig & Rawlings (eds) *Law and Administration in Europe* 124 *et seq* about the potentially limiting impact of the term “government by contract” and its equation to “government contracting” in English law.

<sup>209</sup> Act 87 of 1981 s 4(3).

<sup>210</sup> For discussions of public service employment see Du Toit *et al Labour Relations Law* 196 – 202; Olivier (1994) 9 *SAPR/PL* 50, (1993) 14 *ILJ* 1371; Hersch (1993) 14 *ILJ* 1131; Grogan (2006) April *Employment Law Journal* 3, (2006) October *Employment Law Journal* 4, (1993) 110 *SALJ* 422, (1991) 108 *SALJ* 237, (1991) 108 *SALJ* 599, (1991) 12 *ILJ* 1, (1990) 11 *ILJ* 655; Beinart 1955 *BSALR* 21; Plewman (1955) 72 *SALJ* 70.

<sup>211</sup> This is borne out in South Africa by the distinct system of labour law, which is characterised by a separate labour jurisdiction and extensive statutory regulation.

<sup>212</sup> See Van Wyk *Persoonlike Status in die Suid-Afrikaanse Publiekreg* 228.

especially in case law, will thus be made during the course of the study and their relevance to the general context explicated.

Finally, “commercial activity” as used here should be distinguished from the term “public procurement”. “Public procurement” is a much narrower term, which specifically refers to “the function of purchasing goods and services from an outside body”<sup>213</sup> by organs of state. This term is narrower than “commercial activity” in at least two important respects. Firstly, “public procurement” only refers to acquisitions and not to instances where the state provides goods or services<sup>214</sup> or where the state is involved in a transaction that cannot be depicted as an acquisition. Secondly, “public procurement” only relates to goods and services and is accordingly restricted in relation to subject matter. For example, it does not extend to transactions involving land. The term “commercial activity”, as is clear from the discussion above, is a much broader notion and includes “public procurement”, but extends to a much wider range of state activity than simply purchasing goods and services.

### **5.3 “Regulation”**

“Regulation” is a familiar legal term that mostly refers to a specific form of legal instrument, namely delegated or subordinate legislation. In this meaning it can be defined as “a rule or order framed and promulgated under proper authority by a superior or governing body for the conduct and management of those under its control.”<sup>215</sup>

In this study, however, the word is given a more general and broader meaning, which is perhaps best understood with reference to the verb

---

<sup>213</sup> Arrowsmith, Linarelli & Wallace *Regulating Public Procurement* 1.

<sup>214</sup> See Penfold & Reyburn in Woolman *et al* (eds) *Constitutional Law of South Africa* 25-7 – 25-8.

<sup>215</sup> Claassen *Dictionary of Legal Words and Phrases* Volume 4 R-40.

“regulate”.<sup>216</sup> *The Oxford English Dictionary* defines “regulate” as: “To control, govern, or direct by rule or regulation; to subject to guidance or restrictions; to adapt to circumstances or surroundings.”<sup>217</sup> *Black’s Law Dictionary* defines “regulation” in similar broad terms as follows: “The act or process of controlling by rule or restriction.”<sup>218</sup> In regulatory scholarship the term “regulation” is understood *inter alia* as “the intentional activity of attempting to control, order or influence the behaviour of others.”<sup>219</sup> Harlow & Rawlings note that “there is more to regulation than simply passing a law. The stress on sustained and focused control points to a need for detailed knowledge of, and close and continuing involvement with, the regulated activity.”<sup>220</sup> The term “regulation” is not necessarily restricted to control, but can also extend to co-ordinating and facilitating.<sup>221</sup> It is in this broad sense that the study addresses the judicial *regulation* of state commercial activity. What is meant with this title is the control, direction and facilitating of state commercial activity by judicial means, including legal restrictions to such activity and the adaptation thereof in its legal setting to the current South African context.

## 6 Outline of the study

The overarching focus of this study is on the way in which courts control, facilitate and make sense of state commercial activity within South African law. It aims to critique the current approach and to investigate alternative models in terms of which courts can engage with state commercial activity within the unique context of constitutional transformation in South Africa.

---

<sup>216</sup> As used for example by Wade & Forsyth in their description of administrative law as “the central body of legal rules which regulate the use of governmental power,” *Administrative Law* 9; see also Baxter’s use of the word, *Administrative Law* 87.

<sup>217</sup> Soanes & Stevenson (eds) *The Oxford English Dictionary* Volume XIII 524.

<sup>218</sup> Garner (ed) *Black’s Law Dictionary* 1289.

<sup>219</sup> Black (2002) 27 *Australian Journal of Legal Philosophy* 1 at 25. Also see Parker *et al* in Parker *et al* (eds) *Regulating Law* 1.

<sup>220</sup> Harlow & Rawlings *Law and Administration* 295.

<sup>221</sup> Black (2002) 27 *Australian Journal of Legal Philosophy* 1 at 17.

Chapter two analyses the state's capacity to engage in commercial activity in South Africa. It traces the historical development of state administration and the ways in which the state has participated in the market place since the earliest days of colonisation. It focuses on the legal conceptualisation of the state's capacity to engage in such activity and highlights a number of factors that have contributed to the view that the state can be equated with private actors in such activity.

Chapter three analyses the current judicial approach to the regulation of state commercial activity. It identifies that approach as a classification one, which attempts to categorise each instance of state commercial activity as either public or private in nature. The criteria used to classify state commercial activity are investigated to assess the viability of this approach. The chapter aims to show that the current approach is not workable and that alternative approaches must be investigated.

Chapters four to six examine alternative approaches to the judicial regulation of state commercial activity that may replace the current classification approach. In chapter four an exclusively private law approach is investigated. This approach attempts to exclude public law rules from the regulation by relying exclusively on private law rules. Chapter five focuses on public law, especially administrative law, regulation of state commercial activity. Again the development and use of such an approach is examined, followed by the identification and discussion of the problems experienced under such an approach. The purpose of chapters four and five is to present the case for exclusively private law and comprehensively public law regulation of state commercial activity respectively and to critique each approach. The conclusion drawn from these two chapters is that a more nuanced combination of private and public law rules is required to fashion a workable approach to the judicial regulation of state commercial activity.

Chapter six accordingly investigates two ways in which such a combination can be achieved. The first option is to create a third regulatory

category aimed specifically at state commercial activity, a separate branch of state commercial law, under which legal rules tailored to the specific context of state commercial activity can be developed. The second option is to develop the current classification approach using a more complex view of the public/private divide in a way that would allow for more fluid application of rules of both public and private law.

The final chapter draws upon the analysis in the preceding chapters to suggest a way forward in developing a new model of judicial regulation of state commercial activity in South Africa.



## CHAPTER TWO

# THE DEVELOPMENT OF THE STATE'S COMMERCIAL CAPACITY

### 1 Introduction

The state's capacity to engage in commercial activity is today largely based on statutory grounds. This is because of the fact that the state's contractual capacity mainly flows from legislation.<sup>1</sup> However, the development of the state's commercial capacity at common law remains of particular relevance for an understanding of the current legal treatment of state commercial action in South Africa. An analysis of this development, from the earliest days of colonial administration at the Cape, together with its theoretical underpinnings point out a number of factors that have contributed to the present dualistic private-public law approach to state commercial activity in South African law.

This chapter starts with an investigation into the origin of the state's (private) commercial capacity. The discussion focuses mainly on the state's capacity to enter into private contracts, but is not restricted to contractual powers. It also looks at other means of state participation in private markets.<sup>2</sup> The purpose of this investigation is to establish the emergence of the distinctly private law commercial capacity of the South African state. It commences with an analysis of the administration under the *Vereenigde Nederlandsche Ge-Octroyeerde Oost-Indische Compagnie* ("VOC") at the Cape between 1652 and 1795 and draws a number of conclusions from the nature of that administration. The discussion continues with a study of the common law conception of the state's commercial powers since the British occupation in 1806. A crucial question in this study is whether Roman Dutch law or English

---

<sup>1</sup> For example the State Tender Board Act 86 of 1968; State Land Disposal Act 48 of 1961; Land Affairs Act 101 of 1987; Public Finance Management Act 1 of 1999.

<sup>2</sup> It is clear for example that the state's capacity to establish companies is an important dimension of its general capacity to engage in commercial activity and accordingly the legal control of that activity. See eg Harlow & Rawlings *Law and Administration* 222 for the relevance of a lack of capacity to establish a company in the control of state commercial activity in English law.

law forms the basis of South African common law on this point. After addressing this question, the discussion focuses on two conceptions of the state's commercial capacity at common law, namely as part of the prerogative powers or flowing from the state's legal personality. The final part of the common law analysis investigates the scope of the state's commercial capacity and in particular whether that capacity is unlimited. It concludes with submissions regarding the limits imposed by the Constitution on the state's commercial powers. The final part of the chapter reviews the current statutory bases of the state's commercial capacity, both in express and implied forms.

## **2 Historical conceptual development in South Africa**

### **2.1 The legal nature of the VOC**

The VOC was created by charter from the Dutch States General<sup>3</sup> in 1602<sup>4</sup> as an amalgamation of a number of smaller companies<sup>5</sup> from various Dutch provinces that have embarked on trade with the East since 1595.<sup>6</sup> The 1602 charter granted the VOC a monopoly for 21 years on all Dutch trade east of the Cape of Good Hope and west of the Straits of Magellan.<sup>7</sup> It was in essence a private commercial enterprise established with capital subscriptions

---

<sup>3</sup> The States-General (*Staten-Generaal*) was the central (federal) governing body of the *Republiek der Vereenigde Nederlanden* and as such handled all foreign affairs of the Republic, including all overseas possessions. Visagie *Regspleging en Reg aan die Kaap van 1652 tot 1806* 7 – 11; Hahlo & Kahn *The Union of South Africa: The Development of Its Laws and Constitution* 10, *The South African Legal System and Its Background* 531 – 533.

<sup>4</sup> Gaastra *De Geschiedenis van de VOC* 20; Van der Walt, Wiid & Geyer *Geskiedenis van Suid-Afrika* 45; Hahlo & Kahn *The Union of South Africa: The Development of Its Laws and Constitution* 10, *The South African Legal System and Its Background* 534; Glamann *Dutch-Asiatic Trade* 3; Wilson & Thompson *Oxford History of South Africa* 185; De Wet (1958) 21 *THRHR* 84 at 85.

<sup>5</sup> Known as “voorcompagnieën”: Gaastra *De Geschiedenis van de VOC* 17.

<sup>6</sup> Gaastra *De Geschiedenis van de VOC* 15 – 20; Van der Walt, Wiid & Geyer *Geskiedenis van Suid-Afrika* 42 – 45; Glamann *Dutch-Asiatic Trade* 3.

<sup>7</sup> Gaastra *De Geschiedenis van de VOC* 20; Hahlo & Kahn *The Union of South Africa: The Development of Its Laws and Constitution* 11, *The South African Legal System and Its Background* 534; Wilson & Thompson *Oxford History of South Africa* 185; De Wet (1958) 21 *THRHR* 84 at 85; Visagie *Regspleging en Reg aan die Kaap van 1652 tot 1806* 24 – 25.

from the public and for the purpose of making a trade profit.<sup>8</sup> Despite this private commercial nature, however, the VOC received a number of sovereign or political powers from the States General. It could conclude treaties with foreign rulers in the East, establish settlements, appoint governors to run the settlements, raise and maintain its own armies and wage war.<sup>9</sup> The States General itself also invested capital in the VOC.<sup>10</sup> Senior appointments in the VOC had to be confirmed by the States General,<sup>11</sup> employees had to take an oath of loyalty to the States General and the VOC had to report periodically on its financial position to the States General.<sup>12</sup> Although it seems clear that the VOC had a distinct public nature,<sup>13</sup> one should not equate it with the Dutch state because of the close relationship between the two bodies. At least some of the formal controls of the States General over the VOC were in reality minimal.<sup>14</sup> Financial accountability to the States General became a formality and the extension of its charter was practically sold to the VOC without inquiring into its standing in any detail, at least up to 1740.<sup>15</sup> Already in 1644

---

<sup>8</sup> Gaastra *De Geschiedenis van de VOC* 20 – 36, 56 – 57; Glamann *Dutch-Asiatic Trade* 3 – 4.

<sup>9</sup> Gaastra *De Geschiedenis van de VOC* 21 – 23; Hahlo & Kahn *The Union of South Africa: The Development of Its Laws and Constitution* 11 – 12, *The South African Legal System and Its Background* 535; Glamann *Dutch-Asiatic Trade* 7; Wilson & Thompson *Oxford History of South Africa* 185; De Wet (1958) 21 *THRHR* 84 at 85; Visagie *Regspleging en Reg aan die Kaap van 1652 tot 1806* 25.

<sup>10</sup> Hahlo & Kahn *The Union of South Africa: The Development of Its Laws and Constitution* 11, *The South African Legal System and Its Background* 534; Glamann *Dutch-Asiatic Trade* 6.

<sup>11</sup> These included governors of overseas settlements: Hahlo & Kahn *The South African Legal System and Its Background* 536; Wilson & Thompson *Oxford History of South Africa* 186.

<sup>12</sup> Gaastra *De Geschiedenis van de VOC* 23; Hahlo & Kahn *The Union of South Africa: The Development of Its Laws and Constitution* 12, *The South African Legal System and Its Background* 535 – 536; Wilson & Thompson *Oxford History of South Africa* 185 – 186.

<sup>13</sup> “The Company was a “staat-buiten-de-staat”...”: Glamann *Dutch-Asiatic Trade* 7.

<sup>14</sup> Gaastra *De Geschiedenis van de VOC* 164; Wilson & Thompson *Oxford History of South Africa* 186; Theal *History of Africa South of the Zambezi Before 1795* volume III 28.

<sup>15</sup> Gaastra *De Geschiedenis van de VOC* 164; Hahlo & Kahn *The South African Legal System and Its Background* 535; Glamann *Dutch-Asiatic Trade* 6 – 7. By 1740 the States General

the *Heren XVII*, the VOC's ultimate governing body, expressed the view that the company's overseas holdings should not be considered as state property, but strictly as private property to be dealt with as the board wished.<sup>16</sup> Although the VOC enjoyed a large measure of sovereign power on concession from the States General, especially in its overseas holdings, it did not have complete sovereign control. At least one important sovereign capacity, namely legislative power, was not granted to the company so that the States General retained legislative control over all territories under the VOC's administration.<sup>17</sup>

## 2.2 VOC administration at the Cape

In 1652 the VOC established a station at the Cape for the sole purpose of providing supplies to its ships on the journey between the Netherlands and the East.<sup>18</sup> It is clear that the company did not have any intention of establishing a significant settlement at the Cape or any plans of colonisation.<sup>19</sup> Although the VOC's plans regarding the limited area of the Cape station soon proved

---

could no longer ignore the deteriorating position of the VOC in the East and demanded a closer inspection of the company's trade before renewing its charter.

<sup>16</sup> Wilson & Thompson *Oxford History of South Africa* 186.

<sup>17</sup> De Wet (1958) 21 *THRHR* 84 at 85, 88 – 91, 94 – 97; Visagie *Regspleging en Reg aan die Kaap van 1652 tot 1806* 25. VOC settlements were considered subject to Dutch sovereignty and in particular that of the States General.

<sup>18</sup> Theal *History of Africa South of the Zambezi Before 1795* volume II 5; Wilson & Thompson *Oxford History of South Africa* 187; Hahlo & Kahn *The South African Legal System and Its Background* 567; Gaastra *De Geschiedenis van de VOC* 80.

<sup>19</sup> Hahlo & Kahn *The South African Legal System and Its Background* 567; Kennedy & Schlosberg *The Law and Custom of the South African Constitution* 5; Van der Walt, Wiid & Geyer *Geskiedenis van Suid-Afrika* 45. In line with this limited purpose of the station at the Cape the *Heren XVII* even considered digging a canal from False Bay to Table Bay in order to create an island of the peninsula, which would be adequate to serve its purpose. Although this plan was never implemented, Jan van Riebeeck, the first commander, did plant a hedge that marked the border of the station and physically separated it from the rest of the surrounding land: Wilson & Thompson *Oxford History of South Africa* 189 – 190; Theal *History of Africa South of the Zambezi Before 1795* volume II 54 – 55.

unattainable because of growing farming needs,<sup>20</sup> its attitude towards the settlement remained the same. It had no intention of creating (or funding) a colony at the Cape and the “administration was essentially that of a trading company concerned with the physical and moral welfare of its servants.”<sup>21</sup>

Hahlo & Kahn aptly describe this approach of the VOC when they note:

Throughout the 150-odd years of its existence the VOC, with an eye on its shareholders, pursued an unashamedly mercantilistic policy, regarding its possessions first and foremost as sources of profit for shareholders at home.<sup>22</sup>

Given this commercial nature and purpose of the Cape station, the Cape administration naturally engaged in commercial activity. It bought land from local inhabitants,<sup>23</sup> traded with passing ships (other than those of the VOC itself)<sup>24</sup> and with the indigenous inhabitants for sheep and cattle,<sup>25</sup> leased cows to free settlers,<sup>26</sup> sold farm implements and supplies to them<sup>27</sup> and

---

<sup>20</sup> See Theal *History of Africa South of the Zambezi Before 1795* volume II 57, 87, 245, 251 – 252, 325 – 326, 399 – 400; Hahlo & Kahn *The South African Legal System and Its Background* 567 – 568; Van der Walt, Wiid & Geyer *Geskiedenis van Suid-Afrika* 60 – 64.

<sup>21</sup> Kennedy & Schlosberg *The Law and Custom of the South African Constitution* 5; Wilson & Thompson *Oxford History of South Africa* 202: “Contemporary attitudes were not consistent with a policy of capital investment. The VOC regarded the Cape essentially as a refreshment station, to be run as economically as possible”; Theal *History of Africa South of the Zambezi Before 1795* volume II 65: “[T]he Cape...was called into existence by the Company solely and entirely for its own benefit”, 362.

<sup>22</sup> Hahlo & Kahn *The South African Legal System and Its Background* 540.

<sup>23</sup> Theal *History of Africa South of the Zambezi Before 1795* volume II 199 – 201.

<sup>24</sup> Theal *History of Africa South of the Zambezi Before 1795* volume II 44.

<sup>25</sup> Theal *History of Africa South of the Zambezi Before 1795* volume II 29, 51, 210 – 211; Wilson & Thompson *Oxford History of South Africa* 192.

<sup>26</sup> Theal *History of Africa South of the Zambezi Before 1795* volume II 53. As early as 1657 the VOC discharged employees and allowed them, under strict conditions, to settle at the Cape as “free settlers” (“vryburgers”) granting them land to farm near the station. This was not, however, an intentional move towards colonisation, but rather a strategy to increase food production at little or no cost to the company by substituting settler farming for VOC farming: Wilson & Thompson *Oxford History of South Africa* 194; Kennedy & Schlosberg *The Law and Custom of the South African Constitution* 5.

bought their produce and livestock.<sup>28</sup> The nature of the administration at the Cape from 1652 to 1795<sup>29</sup> was therefore that of a private company wielding governmental or public powers<sup>30</sup> on concession from the Dutch state. Even the highest local official, the governor,<sup>31</sup> was in essence an employee of the VOC.

### 2.3 Colonial origin of the legal view of state commercial activity

This nature of the early colonial government at the Cape is an important factor in the conceptual development of the legal treatment of state commercial activity in South African law. Since the administration was in essence a private legal person, its participation in the private market was consequently equated with similar action by any other private participant and was legally regulated as such. This applies to the state's commercial capacity as well as liability. This may help explain why the Cape Supreme Court in 1887 found the state's non-liability in delict, as determined by English law, to be "anomalous" in South Africa<sup>32</sup> and why Smith J in the same case was of the opinion that it was "absolutely necessary" that the legislature in South Africa should pass legislation subjecting the Crown to "normal" liability in the

---

<sup>27</sup> Wilson & Thompson *Oxford History of South Africa* 194; Kennedy & Schlosberg *The Law and Custom of the South African Constitution* 5; Theal *History of Africa South of the Zambezi Before 1795* volume II 60 – 64.

<sup>28</sup> Hahlo & Kahn *The South African Legal System and Its Background* 540; Wilson & Thompson *Oxford History of South Africa* 194 – 198; Theal *History of Africa South of the Zambezi Before 1795* volume II 62, 401, volume III 65 – 66.

<sup>29</sup> The date of the first British occupation, which ended VOC rule at the Cape.

<sup>30</sup> The private-public law distinction was an established part of the Roman Dutch law transplanted to the Cape in 1652: Floyd *Die Owerheidsooreenkoms – 'n Administratiefregtelike Onderzoek* 326 – 327.

<sup>31</sup> The first head of the Cape administration, Jan van Riebeeck, was appointed as a Commander and only in 1690 was the settlement considered important enough to warrant the promotion of then Commander Simon van der Stel to Governor: Theal *History of Africa South of the Zambezi Before 1795* volume II 363; Hahlo & Kahn *The South African Legal System and Its Background* 537; Kennedy & Schlosberg *The Law and Custom of the South African Constitution* 6.

<sup>32</sup> *Binda v Colonial Government* (1887) 5 SC 284 at 291 per De Villiers CJ.

courts.<sup>33</sup> The need expressed by the judges was addressed by the Crown Liabilities Act<sup>34</sup> in the Cape and subsequently followed in all the other provinces,<sup>35</sup> about 60 years prior to similar developments in English law.<sup>36</sup>

The ostensible private legal nature of the VOC seems to have had a significant impact on the early legal conceptualisation of the administration's commercial activities in South Africa. The private form of the VOC rather than its mainly public functions as the government at the Cape seems to have been the critical factor in these early stages of local legal development. The equation in South African law of the state or administration in its commercial activities with private commercial actors, which persists to this day, can thus be traced back to the origins of colonial government in South Africa.

### **3 The state's commercial capacity**

#### **3.1 Common law**

##### **3.1.1 Capacity in English or Roman Dutch law?**

The question regarding the development of the state's (private) commercial capacity inevitably leads to the question whether Roman Dutch law or English law constitutes the constitutional common law of South Africa. On this question there is a difference of opinion among South African legal scholars.<sup>37</sup>

---

<sup>33</sup> *Binda v Colonial Government* (1887) 5 SC 284 at 297, see the similar remarks by De Villiers CJ at 291. See also *South African Railways and Harbours v Edwards* 1930 AD 3 at 8: "A reference to the case of *Binda v Colonial Government* (5 J 284) in the year 1887 show in what an unsatisfactory state the law was prior to the passing of the Crown Liabilities Act at the Cape."

<sup>34</sup> Act 37 of 1888.

<sup>35</sup> Crown Suits Act 14 of 1903 (Natal); Crown Liabilities Ordinance 51 of 1903 (Transvaal) and Crown Liabilities Ordinance 44 of 1903 (Orange River Colony). These statutes were later consolidated in the Crown Liabilities Act 1 of 1910.

<sup>36</sup> In England Crown liability was only statutorily regulated in 1947 with the passing of the Crown Liability Act 1947.

<sup>37</sup> On the one side of the debate are those writers that hold that Roman Dutch law forms the basis of South African constitutional common law. These writers range from purists like Coertze (1937) 1 *THRHR* 34, who argues that there is no indication that English law has transplanted Roman Dutch law in constitutional matters, to more moderate supporters of

Prior to British colonisation and the emergence of a unitary state in South Africa under British rule, Roman Dutch law applied throughout the territory that constituted the Union of South Africa<sup>38</sup> ("The Union") in 1910.<sup>39</sup> The generally accepted rule of both English law and international law is that the existing local law of a conquered territory is not displaced by the law of the conqueror, but remains effective to the extent that such law is not replaced,

---

Roman Dutch law, like Wiechers, who admits that the existing and governing Roman Dutch law has been influenced by English law: Wiechers *Verloren van Themaat Staatsreg* 53 *et seq*, 64, *Administratiefreg* 38; see also Fouché *Die Bevoegdhede van die Staatspresident van Suid-Afrika* 35; JP Verloren van Themaat (1953) 16 *THRHR* 69 at 86; Steyn *Die Aanspreeklikheid van die Staat vir die Onregmatige Dade van sy Dienare* 17, 36; Sonnekus 1985 *TSAR* 121 at 138-139, 144. On the other side of the debate are those that argue that English law is the (primary) source of South African constitutional common law. Baxter *Administrative Law* 34, 396-399 describes claims about the prevalence of Roman Dutch law in South African constitutional law as "extravagant" and opines that "Roman Dutch law has little to offer modern administrative lawyers". See also H Verloren van Themaat (1953) 16 *THRHR* 19; Boule, Harris & Hoexter *Constitutional and Administrative Law* 10; Van Wyk *Persoonlike Status in die Suid-Afrikaanse Publiekreg: 'n Staats- en Administratiefregtelike Studie* 206; Floyd (2005) 20 *SAPR/PL* 378 at 396. However, with the exception of some purists, such as Coertze (1937) 1 *THRHR* 34 ("aanslae deur die Engelse Reg...is deur ons regspruiste, so goed hulle kon, afgeweer maar tog nie met soveel sukses soos ons graag sou wou sien nie" (invasion by English law was resisted by our legal purists, to the best of their ability, but not with as much success as we would like to have seen (my translation))), most scholars agree that both Roman Dutch and English law constitute sources of South African constitutional common law. The difference between the writers seems to center mostly around the extent of English law influence and the specific areas governed by English law and Roman Dutch law respectively.

<sup>38</sup> The first unified constitutional entity in Southern Africa comprising of the Cape, Natal, Orange River and Transvaal colonies and created by the South Africa Act of 1909, 9 Edw 7, c. 9. For a comprehensive discussion of the formation of the Union see Thompson *The Unification of South Africa*; Hahlo & Kahn *The Union of South Africa: The Development of Its Laws and Constitution*; Wiechers *Verloren van Themaat Staatsreg* 192-212.

<sup>39</sup> See Coertze (1937) 1 *THRHR* 34 at 37; Hahlo & Kahn *The Union of South Africa: The Development of Its Laws and Constitution* 17-28; De Wet (1958) 21 *THRHR* 84 and 162; Van Zyl *Die Geskiedenis van die Romeins Hollandse Reg* chapter VII and further the extensive list of sources quoted there in note 6.



either expressly or by necessary implication, by the law of the conqueror.<sup>40</sup> British colonisation of Southern Africa therefore did not displace the existing Roman Dutch law. Instead, the Roman Dutch common law continued to have force to the extent that it was not replaced with English law.<sup>41</sup> The difficult question is therefore whether, in search of the state's commercial capacity, one should turn to English law or Roman Dutch law.<sup>42</sup>

As a point of departure it seems fairly logical that in the Union the state's non-statutory governmental powers would be governed by English law, since it was the British Crown<sup>43</sup> that ruled.<sup>44</sup> However, this point of logic does not

---

<sup>40</sup> In the well known *Calvin's case* (1608) 7 Coke's Reports 1; 2 St Tr 559 it was said: "If a king comes to a ... kingdom by conquest, ... he may at his pleasure alter and change the laws of that kingdom, but until he doth make an alteration of those laws, the ancient laws of that kingdom remain" and in *Campbell v Hall* 1774 1 Cowper 204; 98 English Reports 1045; Lofft 655 Lord Mansfield stated that "the laws of a conquered country continue until they are altered by the conqueror." See Wiechers *Verloren van Themaat Staatsreg* 53-55; Coertze (1937) 1 *THRHR* 34 at 36; De Wet (1958) 21 *THRHR* 239; Hahlo & Kahn *The Union of South Africa: The Development of Its Laws and Constitution* 17; *Halsbury's Laws of England* volume 6 par 878; Keith *The Constitution, Administration and Laws of the Empire* 9.

<sup>41</sup> *Union Government (Minister of Lands) v Estate Whittaker* 1916 AD 194 at 202-203.

<sup>42</sup> See also Floyd (2005) 20 *SAPR/PL* 378 at 379.

<sup>43</sup> It is not suggested here that the Crown ruled in any absolute way in the Union. What is meant is simply rule by the British Crown in Parliament as in England. See Jackson & Leopold O Hood Phillips and Jackson *Constitutional and Administrative Law* 22, chapter 3, 146-148, 153-166 and Dicey *An Introduction to the Study of the Law of the Constitution* chapter 1 for a discussion of the constitutional position of the Crown as governing through Parliament in England and Hahlo & Kahn *The Union of South Africa: The Development of Its Laws and Constitution* 128-133, 146-150 and Wiechers *Verloren van Themaat Staatsreg* 192-212 for a discussion of the development of the Crown's constitutional position in South Africa. Since it was not only the British monarch that exercised state functions in the Union, but also the British Parliament and executive, the logical application of English law is strengthened. Ironically, although Coertze is one of the strongest champions of Roman Dutch law as constitutional common law in South Africa, he aptly captures the original legal position in the Union (which serves as point of departure here) where he states with reference to the position of the Governor-General in 1910: "Die netto resultaat van hierdie reëling was dat ten aansien van elke administratiewe handeling (d.i. die handeling van sowel die Goewerneur-generaal as mandaathouër van die Koning, as van die Koning persoonlik) die Britse regering 'n kans en 'n bevoegdheid gehad het om sy gesag te laat geld. Hierin het die afhanklikheid van die

provide us with a clear answer to the question under discussion for at least two reasons. Firstly, it is clear that the Crown may abandon any part of its prerogatives and that such abandonment may even be inferred from the circumstances. Thus in *Union Government (Minister of Lands) v Estate Whittaker* Solomon JA stated:

[I]t may ...be shown that any portion [of the prerogative] ... had been abandoned by the sovereign power. And that fact may be proved in more ways than one, and amongst others, I think, by the circumstance that in the local law there is a provision which is in direct conflict with the sovereign rights in question. Where that is the case, it is a fair inference that the Sovereign intended

---

uitvoerende gesag van die Unie, as kolonie, bestaan” (The net result of this arrangement was that in relation to every administrative action (that is the actions of the Governor-General as representative of the King, as well as of the King personally) the British government had the opportunity and power to exert its authority. This was the source of the dependence of the executive authority of the Union as colony (my translation)): (1939) 3 *THRHR* 249 at 251.

<sup>44</sup> These non-statutory powers of the Crown in English law are referred to as the royal prerogatives. Baxter *Administrative Law* 397 note 74; *Union Government (Minister of Lands) v Estate Whittaker* 1916 AD 194 at 210: “It would seem clear that, notwithstanding that the law of England had not been introduced, the prerogative rights of the Sovereign would extend to the new dominion”; *Colonial Treasurer v Johannes Jacobus Coetzer* 1872 NLR 40 at 42 where Connor J stated that “[t]hey had to deal with the Crown of England, which, having the right to establish what law it pleased, had established in a qualified way the Roman Dutch Law as existing in another colony of its own, and he would be unwilling to suppose that the Crown intended thereby to part with some of the essential principles connected with the Crown of England as a Crown”; Keith *Constitution, Administration and Laws of the Empire* 9: “Whatever the local law may be, the fact of conquest introduces automatically the English common-law regarding the political rights of the crown”; *Halsbury’s Laws of England* volume 6 par 878: “This doctrine of continuation [that is the doctrine that local law remains in force] ... does not apply at all to constitutional questions, at least in so far as these depend on the British concept of the exercise of sovereign authority by the Crown” (footnotes omitted). For general discussion of the development of the English law royal prerogatives see Jackson & Leopold O Hood Phillips and Jackson *Constitutional and Administrative Law* chapter 15 and from a South African perspective Baxter *Administrative Law* 389-396; Carpenter (1989) XXII *CILSA* 190.

to abandon that portion of his prerogative in the conquered territory.<sup>45</sup>

In the context of the current query it follows that both English law and Roman Dutch law are relevant in that English law tells us what the state's powers are, but subject to conflicting Roman Dutch law that may indicate an abandonment of such powers. Secondly, the application of English law based on this logical point of departure is restricted to the governmental powers of the state. Although it seems a logical consequence of rule by the British Crown that the state's "constitutional position in regard to matters of government"<sup>46</sup> in the Union should be established with reference to English law, the commercial capacity of the state is not necessarily subject to the same logic. A distinction is therefore drawn between those powers<sup>47</sup> of the state that are closely related to its governmental function and those that are not. As far as the former are concerned English law will govern, but regarding the latter the existing Roman Dutch law may be applicable.<sup>48</sup> This approach in itself is problematic for

---

<sup>45</sup> 1916 AD 194 at 210.

<sup>46</sup> *Union Government (Minister of Lands) v Estate Whittaker* 1916 AD 194 at 203 per Innes CJ.

<sup>47</sup> "Powers" should be read wider here than the narrow content often given to the term in discourse regarding the prerogative where it refers only to the state's authoritative or superior capacity as opposed to terms such as "capacity" or "liberty", which do not include an element of coercion. See Baxter *Administrative Law* 384393-396. The term "powers" as used here includes what Baxter calls "powers, privileges, liberties and attributes," see *Administrative Law* 396.

<sup>48</sup> See *Union Government (Minister of Lands) v Estate Whittaker* 1916 AD 194 at 203 where Innes CJ described the latter category as "the rights of the State with regard to the acquisition, alienation and disposition of property" and "transactions relating to the ownership of property", and at 211 per Solomon JA. Keith *The Constitution, Administration and Laws of the Empire* 9 distinguishes along the same lines between "political rights of the Crown" and "minor rights of the Crown" stating that "[w]hatever the local law may be, the fact of conquest or cession introduces automatically the English common law regarding the political rights of the Crown...The local common law becomes of importance only as regards the minor rights of the Crown which are not essentially bound up with its sovereignty; thus it has been held that...the form of remedy against the Crown in respect of contractual rights known in England as the petition of right [is not applicable in the colony]." In *Halsbury's Laws of England* volume 6 par 878 a similar distinction is made between constitutional questions and

various reasons, as a number of commentators have indicated.<sup>49</sup> It is not beyond doubt that the commercial capacity of the state can in fact be separated from its political persona.<sup>50</sup> Furthermore, this approach calls for a classification of state powers without knowing in terms of what law to do that classification.<sup>51</sup>

Although case law provides some guidance on how to answer the question as to the common law source of the state's commercial capacity, one finds no dispositive treatment of the matter in South African law reports. It is clear from judgements dating from the British rule at the Cape and Natal

---

especially property rights. Baxter *Administrative Law* 398 note 75 refers to "governmental" and "non-governmental" prerogatives; see also Hahlo & Kahn *The Union of South Africa: The Development of Its Laws and Constitution* 170.

<sup>49</sup> Wiechers *Verloren van Themaat Staatsreg* 64; JP Verloren van Themaat (1953) 16 *THRHR* 69 at 82; Steyn *Die Aanspreeklikheid van die Staat vir die Onregmatige Dade van sy Dienare* 21-22.

<sup>50</sup> These distinctions are criticised by a number of authors for being difficult to maintain and for being artificial, see Wiechers *Verloren van Themaat Staatsreg* 64 (describing Keith's approach as unsatisfactory); JP Verloren van Themaat (1953) 16 *THRHR* 69 at 82; Steyn *Die Aanspreeklikheid van die Staat vir die Onregmatige Dade van sy Dienare* 21-22 (questioning whether Keith's "minor rights" are in fact unrelated to the Crown's governmental powers). Although Baxter seems to support some form of distinction between different functions of the state (see *Administrative Law* 398, especially note 75 where he refers to "governmental" and "non-governmental" prerogatives), he notes that such distinction is difficult to draw in practice and argues with specific regard to state contracting that that function is indeed a public or governmental one and not a private function: *Administrative Law* 62, 352, 395-396, 398 note 75.

<sup>51</sup> This problem is a very similar to the conceptual difficulty of categorisation in private international law. In a typical conflict of laws one is required to classify a specific legal rule in dispute as belonging to one or other of a number of categories for which there exist a potentially applicable conflict of laws rule. The purpose of these conflict of laws rules is to establish which legal system applies to the dispute, but the difficulty is to know in terms of which legal system the stated classification should be done in order to establish which legal system applies. This problem is recognised in private international law as one of the fundamental conceptual difficulties of the field. See Forsyth *Private International Law* 68-71; Lipstein in Lipstein (ed) *International Encyclopedia of Comparative Law Volume III Private International Law* chapter 5; Collins (ed) *Dicey and Morris on the Conflict of Laws* chapter 2.

colonies that the state<sup>52</sup> did engage in commercial activity from the earliest days of colonisation.<sup>53</sup> However, the common law capacity of the state to

---

<sup>52</sup> Under British control.

<sup>53</sup> See *Bilingsley, QQ Hawkins v Colonial Government* (1830) 1 Menz 438 (Cape Colonial Government giving a guarantee for the purchase price to all sellers at public auction); *Malan v Cape Town and Wellington Railway Company* (1861-1863) 4 Searle 81 (Cape Colonial Government contracting for the construction of railway lines by private contractor); *Edward London v The Hon D Erskine Colonial Secretary and as such Representing The Government of Natal* (1867-1868) NLR 223 (Natal Colonial Government entering into bookbinding contract); *T P O Meara v The Colonial Government* 1869 NLR 16 (Natal Colonial Government entering into construction contract); *Inglesby v The Colonial Government* (1876) 6 Buch 125 (Cape Colonial Government entering into construction contract); *Holland v Commissioner of Crown Lands and Public Works* (1877) 7 Buch 105 (Cape Colonial Government contracting for transport services by private contractor); *Cave's Imperial Brewery v The Cape Government Railways* (1885-1906) 2 Buch AC 151 (Cape Colonial Government through its Railway Department concluding a contract for the carriage of goods); *War Department v Gibson Brothers* (1885-1886) 4 SC 83 (Cape Colonial Government contracting for transport services by private contractor); *The Colonial Government v Smith, Lawrence & Mould, and Others* (1885-1886) 4 SC 194 (Cape Colonial Government contracting for construction of railway lines by private party); *Colonial Government v Edenborough and Another* (1885-1886) 4 SC 290 (Cape Colonial Government contracting for the transport of goods); *Bull, Sons, & Co v The Colonial Government* (1888-1889) 6 SC 283 (Cape Colonial Government contracting for the construction of buildings by private party); *The Colonial Government v Smith's Executors* (1889-1890) 7 SC 129 (Cape Colonial Government entering into partnership agreement with private party to exploit for gain guano on state land); *Worcester Municipality v The Colonial Government* (1890-1891) 8 SC 195 (Cape Colonial Government selling immovable property); *Bullen v The Colonial Government* (1893) 14 NLR 113 (Natal Colonial Government entering into contract for the construction of buildings by private contractor); *Johns v Colonial Government* (1898) 15 SC 245 (Cape Colonial Government entering into long term lease); *James D Logan & Co v The Colonial Government* (1901) 18 SC 60 (Cape Colonial Government as landlord under a contract of lease); *Roux v Colonial Government* (1901) 18 SC 143 (Cape Colonial Government contracting for the construction of a dam by private contractor); *Kadwa v Colonial Government* (1905) 26 NLR 62 (Natal Colonial Government entering into contract of lease); *Bergl v Colonial Government* (1906) 23 SC 112 (Cape Colonial Government contracting for the purchase of goods); *Houlder Bros v Colonial Government* (1906-1909) 3 Buch AC 29 (Cape Colonial Government contracting for the purchase of coal); *Hills v Colonial Government* (1885-1906) 2 Buch AC 355 (Cape Colonial Government contracting for the construction of railway lines by private contractor); *Soeker v Colonial Government* (1906-1909) 3 Buch AC 207 (Cape Colonial Government

engage in such activity was not in issue in any of these cases.<sup>54</sup> In an important early decision, *Binda v Colonial Government*,<sup>55</sup> the colonial government resisted a claim in delict based on the negligence of one of its servants. It argued that the Colonial Government as representative of the Crown was not liable in delict because of the English prerogative powers of the Crown.<sup>56</sup> The court agreed with this argument and De Villiers CJ noted:

I have not, however, thought it necessary to enter into a thorough investigation of the Roman and Dutch Laws on the subject, because the legal relations subsisting between the Government and its officials must, to a great extent, depend upon the law of England.<sup>57</sup>

This often quoted passage provides strong support for the argument that the Crown's legal position in South Africa is governed by English law.<sup>58</sup> However, De Villiers CJ restricted his discussion to the delictual context of the case and

---

contracting for transport services for judges on circuit); *Knut Allard v Colonial Government* (1907) 28 NLR 422 (Natal Colonial Government contracting for the use of its docks by private ship owner); *Phillips v The Colonial Government* (1907) 24 SC 511 (Cape Colonial Government entering into building contract for construction of government buildings); *Hurwitz v Colonial Government & Others* (1909) 26 SC 217 (Cape Colonial Government as landlord under a contract of lease); *Colonial Government v Van Heerden* (1910) 27 SC 248 (Cape Colonial Government contracting for the purchase of land and stepping into existing lease agreements as landlord); Floyd *Die Owerheidsooreenkoms – 'n Administratiefregtelike Ondersoek* 330-332; Hahlo & Kahn *The Union of South Africa: The Development of Its Laws and Constitution* 194.

<sup>54</sup> In a number of these cases, but far from all, the state's capacity to act came from statutory sources, see eg *Bilingsley, QQ Hawkins v Colonial Government* (1830) 1 Menz 438; *Malan v Cape Town and Wellington Railway Company* (1861-1863) 4 Searle 81; *Johns v Colonial Government* (1898) 15 SC 245; *Hills v Colonial Government* (1885-1906) 2 Buch AC 355.

<sup>55</sup> (1887) 5 SC 284.

<sup>56</sup> *Binda v Colonial Government* (1887) 5 SC 284 at 287 – 288. The specific prerogative at issue was the Crown's immunity encapsulated by the maxim "the King can do no wrong."

<sup>57</sup> *Binda v Colonial Government* (1887) 5 SC 284 at 290.

<sup>58</sup> This passage has also been subjected to much criticism, see Wiechers *Verloren van Themaat Staatsreg* 64, *Administratiefreg* 348; *Verloren van Themaat* (1953) 16 *THRHR* 69 at 86, (1957) 20 *THRHR* 245 at 247; Coertze (1937) 1 *THRHR* 34; Steyn *Die Aanspreeklikheid van die Staat vir die Onregmatige Dade van sy Dienare* 2.

noted: “Now, in the Matter of Contracts, I am not aware that there is any substantial difference between the rights and liabilities of the Government and those of individuals...”<sup>59</sup> These *obiter* remarks suggest that the commercial capacity of the state should be evaluated in terms of Roman Dutch law, being the law applicable to the equivalent capacity of private individuals.

In one of the most important post-Union judgements regarding the common law powers of the state, *Sachs v Dönges NO*,<sup>60</sup> the revocation of a passport issued to a Union national was in issue. The Minister of the Interior applied to the High Court for an order directing the respondent to produce his passport for cancellation because it was issued without the Minister’s authority and subsequently cancelled by the Minister.<sup>61</sup> The High Court granted the order and the respondent appealed to the Appellate Division.<sup>62</sup> Despite the fact that each judge of appeal delivered his own reasons, the court seems in agreement on the scope and role of the royal prerogative in South African law.<sup>63</sup> With reference to Dicey,<sup>64</sup> Watermeyer CJ described the prerogative as “the ‘discretionary authority of the executive’, that is, anything which the King or his servants, duly authorised by him, may do without the authority of an Act of Parliament.”<sup>65</sup> Although Watermeyer CJ seemingly qualified this broad description of the prerogative by paraphrasing the word “anything” in above quotation on the following page of the judgement with “executive action by the Crown”,<sup>66</sup> it seems that he viewed contractual actions as included in this

---

<sup>59</sup> *Binda v Colonial Government* (1887) 5 SC 284 at 288.

<sup>60</sup> 1950 2 SA 265 (A).

<sup>61</sup> *Sachs v Dönges NO* 1950 2 SA 265 (A) at 273-274.

<sup>62</sup> *Sachs v Dönges NO* 1950 2 SA 265 (A) at 274.

<sup>63</sup> *Sachs v Dönges NO* 1950 2 SA 265 (A) at 275 (Watermeyer CJ), 288-289 (Centlivres JA), 303 (Greenberg JA), 306 (Schreiner JA), 307 (Van den Heever JA), however, compare Van den Heever JA’s remarks at 309 and 317, which indicates (at least some) leaning towards an alternative view of the prerogative, see further the discussion of the prerogative below.

<sup>64</sup> Dicey *An Introduction to the Study of the Law of the Constitution*.

<sup>65</sup> *Sachs v Dönges NO* 1950 2 SA 265 (A) at 275.

<sup>66</sup> *Sachs v Dönges NO* 1950 2 SA 265 (A) at 276.

category of state action.<sup>67</sup> Schreiner JA likewise described the prerogative in broad terms when he stated:

The word [prerogative] is ordinarily used to describe compendiously the non-statutory powers of the executive ... An act done by virtue of the prerogative is simply an act done by the executive, without statutory authority ...<sup>68</sup>

The court subsequently made it clear that the source of law applicable to this power of the state is English law and not Roman Dutch law.<sup>69</sup> This case lends support to the view that the state's common law commercial powers or capacity forms part of the royal prerogative<sup>70</sup> and hence should be determined with reference to English law. However, this view is not beyond all doubt. The value of *Sachs v Dönges NO*<sup>71</sup> as precedent is undermined by the division in reasons delivered in the judgement.<sup>72</sup> In a subsequent judgement<sup>73</sup> the Appellate Division concluded that there is no binding *ratio decidendi* flowing from the former case because there was no majority of judges on the bench concurring in a single set of reasons.<sup>74</sup> This ruling seems to be incorrect to the extent that a majority of judges in *Sachs v Dönges NO*<sup>75</sup> did agree on the application of English law to determine the scope and

---

<sup>67</sup> This follows from the reference in the very next paragraph to breach of contract by the Crown and from his later statement that the grant of a passport (the executive action/prerogative power *inter alia* in issue in the case) amounts to a contract from a juristic point of view, *Sachs v Dönges NO* 1950 2 SA 265 (A) at 278.

<sup>68</sup> *Sachs v Dönges NO* 1950 2 SA 265 (A) at 306. Note also Schreiner JA's statement that the word "powers" as used by him should not be read restrictively.

<sup>69</sup> *Sachs v Dönges NO* 1950 2 SA 265 (A) at 275, 288, 306-307.

<sup>70</sup> On the scope of the royal prerogative in South African law, see further the discussion below.

<sup>71</sup> 1950 2 SA 265 (A).

<sup>72</sup> Each of the five judges of appeal delivered his own reasons with Watermeyer CJ, Greenberg JA and Schreiner JA agreeing on the order and Centlivres JA and Van den Heever JA dissenting. Watermeyer CJ and Greenberg JA, however, based their conclusions on different reasons with Schreiner JA agreeing with both.

<sup>73</sup> *Fellner v Minister of the Interior* 1954 4 SA 523 (A).

<sup>74</sup> *Fellner v Minister of the Interior* 1954 4 SA 523 (A) at 532. Ironically, this later judgement is also marked by a plethora of judgements!

<sup>75</sup> 1950 2 SA 265 (A).



characteristics of the prerogative powers.<sup>76</sup> However, a majority of judges did not clearly agree on the contractual nature of the state action under scrutiny,<sup>77</sup> with the result that the application of English law to determine the commercial capacity of the state was not authoritatively established. Furthermore, the categorisation of actions pertaining to passports as contractual in *Sachs v Dönges NO*<sup>78</sup> was expressly overruled in later judgements.<sup>79</sup> This raises the question whether the treatment of the prerogative in *Sachs v Dönges NO*<sup>80</sup> extends to commercial action or capacity of the state or whether it is restricted to the state's (purely) governmental functions, which brings one back to the difficulty regarding categorisation of functions noted above.

Despite the specific problems surrounding *Sachs v Dönges NO*<sup>81</sup> as supporting the argument that the state's (private) commercial capacity should be determined with reference to the English law prerogative, there are a number of South African cases that point the other way. In a number of cases the state's powers in South Africa have been established with reference to Roman Dutch law as opposed to the English law prerogative. These cases are often cited by writers who argue in favour of Roman Dutch law as the (or one) source of the state's common law powers in South Africa.<sup>82</sup> One of the most significant issues in this regard is the running of prescription against the state. It is accepted in South Africa that prescription does run against the state in accordance with Roman Dutch law and contrary to English law

---

<sup>76</sup> *Sachs v Dönges NO* 1950 2 SA 265 (A) at 275 (Watermeyer CJ), 288-289 (Centlivres JA), 306 – 307 (Schreiner JA) and 307 (Van den Heever JA).

<sup>77</sup> Van den Heever JA and Centlivres JA expressly rejected the contract analogy, while Greenberg JA seemingly agreed on this point with Centlivres JA: *Sachs v Dönges NO* 1950 2 SA 265 (A) at 313 (Van den Heever JA), 299 (Centlivres JA), 303 – 304 (Greenberg JA).

<sup>78</sup> 1950 2 SA 265 (A) at 278 (per Watermeyer CJ, Schreiner JA concurring).

<sup>79</sup> *Fellner v Minister of the Interior* 1954 4 SA 523 (A) at 536, 541, 551. See Burns & Carpenter in Joubert (ed) *The Law of South Africa* volume 11 (first edition) par 106. The granting and revocation of passports in South Africa are now statutorily regulated by means of the South African Passports and Travel Documents Act 4 of 1994.

<sup>80</sup> 1950 2 SA 265 (A).

<sup>81</sup> 1950 2 SA 265 (A).

<sup>82</sup> Wiechers *Verloren van Themaat Staatsreg* 61-63; Steyn *Die Aanspreeklikheid van die Staat vir die Onregmatige Dade van sy Dienare* 13-21, 36.

prerogative powers.<sup>83</sup> Similarly, it is said that Roman Dutch law applies to *bona vacantia* and ownership of gold and silver mines in South Africa and not the relevant principles forming part of the English law prerogative in this regard.<sup>84</sup>

A final argument in favour of English law as the source of South African constitutional common law can be based on the nature of the Dutch administration at the Cape before 1795. As noted above,<sup>85</sup> the VOC Cape administration cannot be labeled as a truly public one. It was for the most part that of a private company exercising a number of political or public powers upon concession from the Dutch States General.<sup>86</sup> From this fact one may

---

<sup>83</sup> *Latsky v Surveyor-General* (1877) 7 Buch 68; *Municipality of French Hoek v Hugo* (1883) 2 SC 230; *Schoof v Weyer* (1885-1887) 5 EDC 33; *Blackenberg v The Colonial Government* (1894) 11 SC 90; *Jones v Town Council of Cape Town* (1895) 12 SC 19; *Paarl Municipality v The Colonial Government* (1906) 23 SC 505; *Union Government (Minister of Lands) v Estate Whittaker* 1916 AD 194; *Van der Merwe v Minister of Defence* 1916 OPD 47; *Union Government v Tonkin* 1918 AD 533; *Schreve v Minister of Agriculture* 1974 3 SA 76 (OK); *Oertel NO v Direkteur van Plaaslike Bestuur* 1983 1 SA 354 (A), but cf *Colonial Treasurer v Johannes Jacobus Coetzer* 1872 NLR 40. See also *S v Gqozo and Another* 1994 2 SA 756 (CK) at 772; *Baxter Administrative Law* 397; *Wiechers Verloren van Themaat Staatsreg* 59-60; *Meyers* (1946) 9 *THRHR* 3 at 20 - 21.

<sup>84</sup> *Ex Parte Leeuw* (1905) 22 SC 340; *Rainbow Diamonds (Edms) Bpk v Suid-Afrikaanse Nasionale Lewensassuransiematskappy* 1984 3 SA 1 (A); *Baxter Administrative Law* 397; *Wiechers Verloren van Themaat Staatsreg* 61; *Sonnekus* 1985 *TSAR* 121 at 138-139, 144, 147; *Steyn Die Aanspreeklikheid van die Staat vir die Onregmatige Dade van sy Dienare* 14, 15. The jurisprudence regarding *bona vacantia* in this respect is not entirely consistent, see *Estate Baker and Others v Estate Baker and Others* (1908) 25 SC 234 and *Ex Parte The Government* 1914 TPD 596 where the Crown's right to *bona vacantia* was described in terms of English law. Even the Appellate Division in the *Rainbow Diamonds*-case referred to both Roman and English law in discussing the state's rights to *bona vacantia*, without indicating which of the two should be regarded as the "true" source of those rights in South Africa: *Rainbow Diamonds (Edms) Bpk v Suid-Afrikaanse Nasionale Lewensassuransiematskappy* 1984 3 SA 1 (A) at 10. The position regarding state ownership of mines has, however, been regulated by statute from at least 1898, which may indicate that the English law prerogative has simply been statutorily altered, see Cape Act No 31 of 1898; Orange Free State Ordinance No 3 of 1904.

<sup>85</sup> See par 2 above.

<sup>86</sup> See notes 21, 22 and 29 - 30 and accompanying text above.

argue that (Roman Dutch) constitutional law, particularly administrative law, was of little relevance in respect of the daily governing of the Cape prior to 1795. However, even if one assumes that the Cape was governed by the VOC on behalf and in the name of the Dutch States General, so that Dutch constitutional law was of relevance at the Cape in that it applied to the local VOC administration, it still does not follow that *Roman Dutch* law was of any relevance. Following this argument the relevant constitutional law would certainly be that which applied to the States General itself. The States General was the commonwealth authority of the United Netherlands with limited powers.<sup>87</sup> The provinces constituting the Republic retained their inherent powers and sovereignty.<sup>88</sup> There was no law of general application throughout the Netherlands since each province retained its own laws.<sup>89</sup> It follows that the States General was not subject to Roman Dutch law, which was the law of the province of Holland.<sup>90</sup> Therefore, the Cape administration could not be subject to Roman Dutch constitutional law.<sup>91</sup>

The best approach to the question regarding the source of South African constitutional common law is probably that the character of the Crown and hence the state itself, which includes its capacities, immunities and powers, was governed by English law (traditionally as part of the royal prerogative). This view seems to be consistent with the fact that it was the English Crown

---

<sup>87</sup> See Van der Pot *Handboek van het Nederlandse Staatsrecht* 91 – 98; Visagie *Regspleging en Reg aan die Kaap van 1652 tot 1806* 7 – 11; Hahlo & Kahn *The South African Legal System and Its Background* 531 – 533.

<sup>88</sup> Visagie *Regspleging en Reg aan die Kaap van 1652 tot 1806* 3 – 8, 13; Hahlo & Kahn *The Union of South Africa: The Development of Its Laws and Constitution* 10, *The South African Legal System and Its Background* 532 – 533.

<sup>89</sup> Visagie *Regspleging en Reg aan die Kaap van 1652 tot 1806* 15 – 23; Hahlo & Kahn *The Union of South Africa: The Development of Its Laws and Constitution* 10; De Wet (1958) 21 *THRHR* 84; Hosten et al *Introduction to South African Law and Legal Theory* 172 – 174.

<sup>90</sup> Van Zyl *Geskiedenis van die Romeins Hollandse Reg* 290.

<sup>91</sup> Regarding private law, it has been convincingly argued that Roman Dutch law became the de facto law of the Cape, although the only competent body to direct such application of Roman Dutch law, the States General, never in fact did so: Visagie *Regspleging en Reg aan die Kaap van 1652 tot 1806* 24 – 39, 63 – 78; De Wet (1958) 21 *THRHR* 84.

that governed<sup>92</sup> in South Africa in the relevant period and is supported by most current administrative law scholars.<sup>93</sup> In contrast to this unified view of capacity, the relationships in which the state stands may be divided into governmental and non-governmental. The sources of the relevant common law governing these relationships are English law and Roman Dutch law respectively. This would mean that the state's capacity to contract (and generally participate in commerce) at common law would be determined by English law, but the action itself (the contract) and the relationships flowing from such commercial action would be largely governed by Roman Dutch law.<sup>94</sup> Such an approach to the common law sources may also help explain why South African positive law experienced the need for a distinction between different aspects or categories of state contracting in the absence of different private and public law jurisdictions as is found in some European systems such as that of Germany and France necessitating such distinctions.

### **3.1.2 The state's common law capacity**

#### **3.1.2.1 Prerogative powers**

If one accepts that the state's common law commercial capacity in South Africa historically flows from the English law royal prerogatives, the next question is what that concept entails. It is now accepted that there are two

---

<sup>92</sup> See note 43 above for a discussion of the meaning of "governed" here.

<sup>93</sup> Baxter *Administrative Law* 389; Hoexter *Administrative Law in South Africa* 32; De Ville *Judicial Review of Administrative Action in South Africa* 91-92; Labuschagne *Staatskontrakte ter Verkryging van Goedere, Dienste en Werke* 30; Boule, Harris & Hoexter *Constitutional and Administrative Law* 176; Barrie (1994) 111 SALJ 788 at 790; Breytenbach (1994) 5 Stell LR 196; Carpenter (1989) XXII CILSA 190 at 201-203; Wiechers remains the notable exception, see *Verloren van Themaat Staatsreg* 64.

<sup>94</sup> Cf *Union Government (Minister of Lands) v Estate Whittaker* 1916 AD 194 at 203: "The inconvenience of applying to matters affecting Crown property rules which form no part of the general jurisprudence of the country would be so great, that we are fully warranted in inferring the abandonment of so much of the prerogative as would lead to that result"; Floyd (2005) 20 SAPR/PL 378 at 379.

notions of the prerogative in English law, the one formulated by Blackstone and the other by Dicey.<sup>95</sup>

Blackstone defines the prerogative as those special powers which the Crown possesses beyond the powers which it shares with all other legal subjects.<sup>96</sup> In Blackstone's view the Crown may therefore be empowered to act non-statutorily either in terms of the prerogative or common law. The Crown thus has all those powers which private citizens possess including contractual capacity. In contrast, Dicey defines the prerogative as encompassing all the Crown's non-statutory powers.<sup>97</sup> In Dicey's view the Crown can only act in terms of legislation or the prerogative. There is no general common law (non-prerogative) source of power and the Crown consequently does not possess all those powers which private citizens do. This difference is quite important since the prerogative is a closed category of

---

<sup>95</sup> Wade & Forsyth *Administrative Law* 216; Jackson & Leopold O Hood Phillips and Jackson *Constitutional and Administrative Law* 304 – 306; Turpin *British Government and the Constitution* 420 – 421; Baxter *Administrative Law* 394; De Ville *Judicial Review of Administrative Action in South Africa* 92; Carpenter (1989) XXII *CILSA* 190 at 190 – 193; Ferreira (1988) 3 *SAPR/PL* 150 at 154.

<sup>96</sup> Blackstone *Commentaries on the Laws of England* volume 1 239: "By the word prerogative we usually understand that special pre-eminence, which the King hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies, in its etymology, (from *prae* and *rogo*) something that is required or demanded before, or in preference to, all others. And hence it follows, that it must be in its nature singular and eccentric; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects: for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer."

<sup>97</sup> Dicey *An Introduction to the Study of the Law of the Constitution* 424 – 425: "The prerogative appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown... The prerogative is the name for the remaining portion of the Crown's original authority, and is therefore, as already pointed out, the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the Queen herself or by her Ministers. Every act which the executive government can lawfully do without the authority of the Act of Parliament is done in virtue of this prerogative."

powers.<sup>98</sup> Dicey's view therefore results in a severe limitation of the Crown's powers as opposed to Blackstone's approach where there is also the residual category of common law powers. The difference is important in the current context since Dicey's view emphasises that all state action is distinct from action taken by private actors, if only because of a distinct public law source.<sup>99</sup> In Blackstone's view the exact opposite seems to emerge, namely that some state actions, mostly commercial actions, are identical to actions taken by any other legal subject.

In English law uncertainty remains regarding the proper view of the royal prerogative, with the result that it is not clear exactly what the nature of the prerogative powers are. Both Blackstone and Dicey's views seem to enjoy support in case law and amongst legal scholars.<sup>100</sup> It is therefore not entirely clear whether the English Crown's commercial capacity or power to conclude contracts forms part of the prerogative.<sup>101</sup>

---

<sup>98</sup> As Lord Diplock noted in *British Broadcasting Corporation v Johns* [1965] Ch 32 at 79: "It is 350 years and a civil war too late for the Queen's courts to broaden the prerogative;" Jackson & Leopold O Hood Phillips and Jackson *Constitutional and Administrative Law* 306.

<sup>99</sup> This is somewhat ironic since Dicey strongly advocated the view that the Crown is subject to the same legal rules as all other legal subjects, see De Ville *Judicial Review of Administrative Action in South Africa* 6 – 7; Wade & Forsyth *Administrative Law* 24. Mathieson (1992) 15 *New Zealand Universities LR* 117 at 137 submits that given Dicey's central argument regarding the equal legal treatment of the state and private individuals he "might have been expected to discuss whether the Crown had the same powers as private citizens to engage in business enterprises. But this seems to be a question that did not occur to him."

<sup>100</sup> In support of the Blackstonian view see Wade & Forsyth *Administrative Law* 216-217; *Halsbury's Laws of England* volume 8(2) par 367 and in support of the Diceyan view, see Jackson & Leopold O Hood Phillips & Jackson *Constitutional and Administrative Law* 305 – 306 and the cases cited in each of these sources.

<sup>101</sup> Turpin *British Government and the Constitution* 420 – 421; Baxter *Administrative Law* 389; Harris (1992) 108 *LQR* 626 at 636 (noting that the government's power to contract may seem to be similar to that of private persons and hence not a true prerogative power as defined by Blackstone, but that it may also be argued that government contracting differ in material respects from contracting by private parties); Daintith (1979) 32 *Current Legal Problems* 41 at 42 (noting that it does not seem to make any difference whether the Crown's capacity to contract is labeled as prerogative powers or not); cf Wade & Forsyth *Administrative Law* 220

In South Africa Dicey's view dominated legal development in this field and it has been authoritatively and expressly accepted by local courts.<sup>102</sup> There are, however, some cases that seem to support the Blackstonian view.<sup>103</sup> Baxter, one of the most important local writers on the topic, has also argued forcefully for the acceptance of Dicey's view.<sup>104</sup> In South Africa the

---

(stating that public authorities may conclude contracts because of their common law "commercial liberty"); Labuschagne *Staatskontrakte ter Verkryging van Goedere, Dienste en Werke* 30 (arguing that the Crown's capacity to enter into contracts flows from the prerogative); Mathieson (1992) 15 *New Zealand Universities LR* 117 at 134 (noting an unpublished discussion paper of the New Zealand Law Commission in which the Commission takes the view that the Crown has a common law power to enter into contracts, which is not a prerogative power) and Freedland 1994 *Public Law* 86 at 91 (arguing that government contracting power is a prerogative power, but noting that this is a controversial view). In a later article Freedland, however, moves somewhat away from his earlier assertion that government contracting rests on prerogative powers and suggests that current (commercial) undertakings and programmes of British governments show "the statutory type and the non-statutory type of power as converging upon a single pattern" and that "the two types of power have merged into each other." He argues that the traditional focus in English constitutional law of powers originating either from statute or non-statute (prerogative) sources may be too simplistic to adequately describe the reality of current (commercial) government action. He maintains, however, that prerogative powers still "formed part of the mixture": Freedland 1998 *Public Law* 288 at 291 – 293.

<sup>102</sup> *Sachs v Dönges NO* 1950 2 SA 265 (A) at 275 (per Watermeyer CJ), 289 (per Centlivres JA), 306 (per Schreiner JA), 307 (per Van den Heever JA); *Tutu v Minister of Internal Affairs* 1982 4 SA 571 (T); *East London Western Districts Farmers' Association v Minister of Education and Development Aid* 1989 2 SA 63 (A) at 70. For a general discussion of Dicey's strong influence on South African law, see De Ville *Judicial Review of Administrative Action in South Africa* 6 – 23.

<sup>103</sup> *Binda v Colonial Government* (1887) 5 SC 284 at 288 (see De Villiers CJ's remarks quoted above in the text accompanying note 59); *Garment Workers' Union v Schoeman NO and Others* 1949 2 SA 455 (A) at 462 (equating the Crown's power to appoint commissions of enquiry with that of any private individual); *Diedericks v Minister of Lands* 1964 1 SA 49 (N) at 58 (equating the state's freedom of contract with that of any private individual).

<sup>104</sup> Baxter *Administrative Law* 395 argues that the Blackstonian view harks from a period when the personal and official capacities of the Crown were not separated yet and thus belongs to an outdated constitutional model. See also Loughlin in Jowell & Oliver (eds) *The Changing Constitution* 67 (describing Dicey's views as "an orthodox, if rather general, modern understanding of prerogative powers"); De Ville *Judicial Review of Administrative Action in*

state's common law commercial capacity thus existed in the royal prerogative<sup>105</sup> apart from similar private law concepts applicable to all non-state legal subjects. These common law royal prerogative powers were preserved and transferred from the Crown to the State President in the 1961 republican Constitution.<sup>106</sup> Their continued existence was similarly confirmed

---

*South Africa* 91-92; Carpenter (1989) XXII *CILSA* 190 at 193; Mandelbrote (1936) 53 *SALJ* 426 (describing the Diceyan view as a modern formulation of the royal prerogative); Ferreira (1988) 3 *SAPR/PL* 150 at 155.

<sup>105</sup> *Minister of Home Affairs v American Ninja IV Partnership* 1993 1 SA 257 (A) at 268: "Obviously the State and its organs can contract. In the absence of any particular enabling statutory provision, the source of this power is the common law prerogative"; *Sedgefield Ratepayers' and Voters' Association and Others v Government of the Republic of South Africa and Others* 1989 2 SA 685 (C) at 697: "It is clear that the Crown or the State is not a creature of statute with circumscribed powers but an omnipotent entity which is free to do what it likes with its own land and, in the exercise of its inherent prerogative, the Crown or the State, acting through the Governor-General or the State President, would normally be able to dispose of Crown or State land as it deemed fit"; Baxter *Administrative Law* 389, 395-396, 421; Hoexter *Administrative Law in South Africa* 32; De Ville *Judicial Review of Administrative Action in South Africa* 91; Labuschagne *Staatskontrakte ter Verkryging van Goedere, Dienste en Werke* 30; Carpenter (1989) XXII *CILSA* 190 at 203.

<sup>106</sup> The Republic of South Africa Constitution Act 32 of 1961 ("1961 Constitution"), s 7(4) read: "The State President shall in addition as head of the State have such powers and functions as were immediately prior to the commencement of this Act possessed by the Queen by way of prerogative." See *Boesak v Minister of Home Affairs and Another* 1987 3 SA 665 (C) at 674; Baxter *Administrative Law* 389; Breytenbach (1994) 5 *Stell LR* 187 at 210 – 211; Ferreira (1988) 3 *SAPR/PL* 150 at 151. It should be noted that a number of prerogative powers were enumerated and expressly conferred on the State President in the 1961 Constitution, which had the effect of transforming such powers from common law prerogative powers to statutory powers, see generally Fouché *Die Bevoegdhede van die Staatspresident van die Republiek van Suid-Afrika* 54 – 58; Wiechers *Verloren van Themaat Staatsreg* 64, 233 – 239. See also *S v Gqozo and Another* 1994 2 SA 756 (CK) at 778 where Heath J argued that s 7(4) of the 1961 Constitution did not preserve the entire prerogative as it exists in England and also existed in South Africa prior to 1961, but only the "powers and functions" component of the prerogative in contrast to the "rights or the protection", which the English Crown enjoys by way of the prerogative. Based on this argument Heath J concluded that the South African State President does not enjoy immunity from prosecution based on the prerogative maxim "the King can do no wrong."



in the 1983 Constitution.<sup>107</sup> However, democratization in 1994 brought about a fundamental change regarding the prerogative powers. Neither the 1993 Constitution nor the 1996 Constitution contained any provision similar to that of the 1961 and 1983 Constitutions preserving the prerogative powers.<sup>108</sup> As a result the Constitutional Court ruled in *President of the Republic of South Africa and Another v Hugo*<sup>109</sup> that the royal prerogative has ceased to be an independent source of executive power in South Africa. In that case a presidential pardon of offenders in terms of section 82(1)(k) of the 1993 Constitution was challenged as being discriminatory and hence unconstitutional. In assessing the nature of presidential pardons the Constitutional Court found that the President retains no previous prerogative powers other than those expressly conferred on him by the Constitution. It seems also that the Constitutional Court endorsed the Diceyan view of the prerogative in this judgement.<sup>110</sup> The *Hugo* ruling was confirmed by the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*<sup>111</sup> and *Mohamed and Another*

---

<sup>107</sup> Republic of South Africa Constitution Act 110 of 1983 ("1983 Constitution"), s 6(4) read: "The State President shall in addition as head of the State have such powers and functions as were immediately before the commencement of this Act possessed by the State President by way of prerogative." See *Boesak v Minister of Home Affairs and Another* 1987 3 SA 665 (C) at 675; Baxter *Administrative Law* 389; Carpenter (1989) XXII *CILSA* 190 at 202; Breytenbach (1994) 5 *Stell LR* 187 at 211 – 212; Ferreira (1988) 3 *SAPR/PL* 150 at 151.

<sup>108</sup> *President of the Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC) at par 7; Breytenbach (1994) 5 *Stell LR* 187 at 209. Both Constitutions do, however, expressly confer specific powers on the President, which formed part of the prerogative in earlier times, similar to the 1961 and 1983 Constitutions. See the 1993 Constitution s 82 and the Constitution s 84; *President of the Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC) at par 5; De Ville *Judicial Review of Administrative Action in South Africa* 90 – 91.

<sup>109</sup> 1997 4 SA 1 (CC) at par 8.

<sup>110</sup> *President of the Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC) at par 5 note 8 (endorsing Schreiner JA's definition of the prerogative in *Sachs v Dönges* NO 1950 2 SA 265 (A) at 306, which is an adoption of the Diceyan view), par 10 (noting that historically the prerogative powers are those powers which are not statutorily granted, this can again be read as an endorsement of the Diceyan view that there are only two types of power viz prerogative and statutory).

<sup>111</sup> 2000 1 SA 1 (CC) at par 144.

*v President of the RSA and Others*.<sup>112</sup> Legal scholars have also expressed their agreement with the demise of the royal prerogative following the 1993 Constitution.<sup>113</sup>

Against this background the Constitutional Court's judgement in *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others*<sup>114</sup> came as somewhat of a surprise. In that case the Government established a transit camp for flood victims on land owned by the state.<sup>115</sup> However, surrounding property owners challenged this use of the state land in question as in conflict with planning laws and unlawful.<sup>116</sup> One of the applicants' arguments was that the (administrative) action taken by the state to establish the transit camp was not authorised by any legislation and hence unlawful.<sup>117</sup> The Constitutional Court rejected this argument<sup>118</sup> and ruled that the state as land owner has all the rights (and ostensibly powers) that private land owners have and that as a result the state can perform any act in terms of those (private) property rights (and powers) as long as it does not contravene any law.<sup>119</sup> In support of this decision Chaskalson P quoted Hogg<sup>120</sup> where the author states: "The Crown's power to do these things is not a prerogative power, because the power is not unique to the Crown, but is

---

<sup>112</sup> 2001 3 SA 893 (CC) at par 31 (also confirming that this is the position under the Constitution).

<sup>113</sup> Breytenbach (1994) 5 *Stell LR* 187 at 209, 212 – 213 (writing before the decision of the Constitutional Court in *President of the Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC)); Hoexter *Administrative Law in South Africa* 33; De Ville *Judicial Review of Administrative Action in South Africa* 90.

<sup>114</sup> 2001 3 SA 1151 (CC).

<sup>115</sup> *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 3 SA 1151 (CC) at par 6.

<sup>116</sup> *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 3 SA 1151 (CC) at pars 7, 8, 24.

<sup>117</sup> *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 3 SA 1151 (CC) at pars 10, 24, 34.

<sup>118</sup> *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 3 SA 1151 (CC) at par 41.

<sup>119</sup> *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 3 SA 1151 (CC) at par 41.

<sup>120</sup> *Constitutional Law of Canada* 28.3.

possessed in common with other legal persons.”<sup>121</sup> It seems that the Constitutional Court resurrected the Blackstonian view of the prerogative in this judgement by finding a non-prerogative common law source of state powers.<sup>122</sup> As noted above, this approach seems curious in the light of the well-established adherence to the Diceyan view of the prerogative<sup>123</sup> and the demise of the prerogative in South African law.

This judgement of the Constitutional Court opens the door to the argument that the state’s commercial capacity in South Africa can be found in (private) common law similar to that of any private individual. Breytenbach already argued in 1994 that such an approach may supplement the ostensible *lacuna* in state powers following the demise of the prerogative.<sup>124</sup> However, such an approach is not without difficulties, foremost of which is the underlying premise that the state has legal personality.<sup>125</sup> This premise will be further investigated in the following paragraph.

### 3.1.2.2 Legal personality

An alternative approach to establishing the state’s commercial capacity is to focus on the legal personality of the state. Although this may be described as an alternative approach to the one taken above, it is closely linked to the prerogative in that Blackstone’s definition of the concept equates the Crown,

---

<sup>121</sup> *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 3 SA 1151 (CC) at par 41.

<sup>122</sup> De Ville *Judicial Review of Administrative Action in South Africa* 93; Floyd (2005) 20 *SAPR/PL* 378 at 380 – 381. Cf *Bullock NO v Provincial Government, North West Province* 2004 5 SA 262 (SCA) at par 13 – 14 where the Supreme Court of Appeal distinguished the Constitutional Court’s approach in *Kyalami Ridge* from the case before it by pointing to public interest in the state land at issue and in decisions regarding the use of such land.

<sup>123</sup> Even by the Constitutional Court itself in *President of the Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC), see note 110 above.

<sup>124</sup> Breytenbach (1994) 5 *Stell LR* 276 at 277 – 283. See also Hoexter *Administrative Law in South Africa* 34 – 36; Floyd (2005) 20 *SAPR/PL* 378 at 387.

<sup>125</sup> Breytenbach (1994) 5 *Stell LR* 276 at 279 – 282 also notes these difficulties; De Ville *Judicial Review of Administrative Action in South Africa* 93.

at one level, with private individuals.<sup>126</sup> In his view the Crown possesses all those common law capacities that private legal subjects have. The basic premise of this view is thus that the state shares corporate legal personality or subjectivity with private individuals.<sup>127</sup> If one accepts this proposition it follows that the state has the capacity to engage in commercial activity like any other legal subject.

The legal personality of the state is, however, not such a simple matter. While it seems relatively obvious that the state is a juristic *persona* in the sense of being created by law,<sup>128</sup> the implications of that status are far from clear. By locating the state's commercial capacity in its asserted corporate legal personality the door is opened to conceptualise all commercial state action (and the consequences of such action) in terms of private law. This flows from the inherently private law model of legal personality or subjectivity used here. In *Die Spoorbond v South African Railways; Van Heerden v South*

---

<sup>126</sup> See Blackstone's definition of the prerogative in note 96 above and accompanying text.

<sup>127</sup> Breytenbach (1994) 5 *Stell LR* 276 at 279; Mathieson (1992) 15 *New Zealand Universities LR* 117 at 119 – 120.

<sup>128</sup> Originally as the Union of South Africa in the South Africa Act of 1909, replaced by the Republic of South Africa in the 1961 Constitution and continued in the 1983, 1993 and 1996 Constitutions. See Wiechers *Verloren van Themaat Staatsreg* 224; Hahlo & Kahn *Laws of the Union of South Africa* 170; Coertze (1940) 4 *THRHR* 246, (1939) 3 *THRHR* 249 at 250, 265; Baxter *Administrative Law* 94-97; Rautenbach & Malherbe *Constitutional Law* 14 – 15, 99 – 101; Breytenbach (1994) 5 *Stell LR* 276 at 280 note 171; Verloren van Themaat (1957) 20 *THRHR* 245; *Die Spoorbond v South African Railways; Van Heerden v South African Railways* 1946 AD 999 at 1005; *Die Regering van die RSA v SANTAM Versekeringsmpy Bpk* 1964 1 SA 546 (W) at 547, 549; *Banco De Mocambique v Inter-Science Research and Development Services (Pty) Ltd* 1982 3 SA 330 (T) at 335. The state also qualifies as a "legal person" and "legal subject" in terms of most general definitions of those concepts in South African law today. See Van der Vyver & Joubert *Persone- en Familiereg* 40 – 50 (who expressly include the state in what they call "verbande" that at least qualify as legal persons); Hahlo & Kahn *The South African Legal System and its Background* 104 – 107; Van Heerden *et al Boberg's Law of Persons and the Family* 4 – 6; Hosten *et al Introduction to South African Law and Legal Theory* 282. It has also been noted that there is no reason to believe that these general definitions should be different when applied in private or public law: Cockrell in *Bill of Rights Compendium* par 3E2; Van Heerden *et al Boberg's Law of Persons and the Family* 3.

*African Railways*<sup>129</sup> Schreiner JA specifically noted that care should be taken not to overstretch the legal personality of the state by analogy to private individuals:

[I]t seems to me that great care should be exercised in arguing by analogy from the rights of one person to the rights of another whose qualities are not identical with those of the first. It is no doubt convenient for certain purposes to treat the crown as a corporation or artificial person. But it is obviously a very different kind of person from the rest of the persons, natural and artificial, that make up the community. In many respects its relationship to those other persons is unique...[I]t would be dangerous to proceed on the assumption that where a substantial measure of similarity between persons is discoverable the rights of those persons must be the same. While the law does at times generalise it does so with caution; as frequently, it prefers to act selectively according to the requirements of the particular situation.

These sentiments have been echoed by legal scholars. Baxter notes: “the Government’ is recognized with ‘the state’, as having legal personality ... But it does not follow that all the doctrinal implications of corporate personality attach to ‘the Government’ as a juristic persona.”<sup>130</sup> Wiechers takes an even stronger stance:

Regtens is die staat ‘n *personne morale*, of te wel ‘n regspersoon met analoë regte en verpligtinge as die fisiese persoon. Die regte en verpligtinge van die staat ... is egter nie dieselfde as dié van die private persoon nie ... Anders as die individu wat sy privaatregtelike regte en verpligtinge enersyds uit sy status en andersyds uit sy vrywillige optredes verkry, word

---

<sup>129</sup> 1946 AD 999 at 1010 – 1011.

<sup>130</sup> Baxter *Administrative Law* 97; see also Baxter (1982) 99 SALJ 212 at 222, 236: “While theories of personality may have a respectable part to play in political philosophy, any attempt to deduce law from them can, in my view, only cause one to lull oneself into a false sense of security and paper over the cracks of reality.”

die staat met regte en verpligtinge beklee uit hoofde van sy posisie as magsdraer.<sup>131</sup>

The state cannot simply be equated with private individuals as far as its legal status is concerned by calling it a “legal person” or “legal subject”.<sup>132</sup> The difficulty is to establish what consequences the law attaches to the state’s status as legal person or, conversely, what the state’s legal personality entails.<sup>133</sup>

In South Africa the state has the capacity to sue.<sup>134</sup> This was confirmed in *Die Spoorbond v South African Railways; Van Heerden v South African Railways*<sup>135</sup> where Schreiner JA said:

---

<sup>131</sup> Wiechers in Strauss (ed) *Huldigingsbundel vir WA Joubert* 279 (Legally the state is a *personne morale*, ie a legal person with rights and obligations analogous to that of a physical person. The rights and obligations of the state are not, however, equivalent to that of the private person. In contrast to the individual whose private law rights and obligations flow from his status and/or his voluntary actions, the state’s rights and obligations flow from its position of authority (my translation)). See also Wiechers *Administratiefreg* 86 note 94; Breytenbach (1994) 5 *Stell LR* 276 at 280 – 282; D’Oliveira *State Liability for the Wrongful Exercise of Discretionary Powers* 23; Harris (1992) 108 *LQR* 626 at 636, 645 – 646.

<sup>132</sup> Mathieson (1992) 15 *New Zealand Universities LR* 117 at 124.

<sup>133</sup> Mathieson (1992) 15 *New Zealand Universities LR* 117 at 120 captures this difficulty when he states that “legal personality is ‘artificial’ in the sense that it is a deliberate creation of statute or the common law, not a natural phenomenon. We cannot decipher the characteristics of a legal person by empirical observations and comparisons.” See also Baxter (1982) 99 *SALJ* 212 at 236; cf *Die Spoorbond v South African Railways; Van Heerden v South African Railways* 1946 AD 999 at 1008. A detailed analysis of the conceptualisation of the state as legal person falls beyond the scope of this study, especially the complex questions regarding the relationships between different organs of state as part of one legal person or as constituting separate legal persons. On these and related matters see Baxter (1982) 99 *SALJ* 212; Verloren van Themaat (1957) 20 *THRHR* 245; Wiechers (1964) 27 *THRHR* 161, *Administratiefreg* 73; D’Oliveira *State Liability for the Wrongful Exercise of Discretionary Powers* 24-29; Booysen (1984) 9 *SAYIL* 56 at 59 – 65; Breytenbach (1994) 5 *Stell LR* 276 at 280; Floyd (2005) 20 *SAPR/PL* 378. I am here only interested in the question whether the legal personality of the state (as defined in this study) gives rise to any general commercial capacity.

<sup>134</sup> Note the cases cited in note 53 above where the state, from the earliest days of colonial rule, approached the courts as plaintiff. See also Breytenbach (1994) 5 *Stell LR* 267 at 280; Rautenbach & Malherbe *Constitutional Law* 100 – 101.

So far as concerns the right of the Crown to bring different kinds of actions in the courts of the land, it may be safe to assert that the Crown can in general sue in matters of contract wherever a subject would have been able to. And the same doubtless applies to many kinds of delict.

It also seems that the state was assigned the capacity to hold property when created by the South Africa Act of 1909.<sup>136</sup> The state's capacity and rights regarding property were furthermore expressly equated with that of other legal subjects in *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others*.<sup>137</sup> It is thus arguable that the state, by extension of the abovementioned capacities, also has a general (commercial) capacity to act or more specifically a capacity to contract.<sup>138</sup> In English law it is recognised that the Crown has legal personality "for some purposes,"<sup>139</sup> which include the capacities to enter into contracts and hold property.<sup>140</sup>

---

<sup>135</sup> 1946 AD 999 at 1012; see also *Die Regering van die RSA v SANTAM Versekeringsmpy Bpk* 1964 1 SA 546 (W) at 547.

<sup>136</sup> Section 122 by vesting all Crown land in the Government of the Union of South Africa by necessity implies the capacity to hold property. See *Winter v South African Railways & Harbours* 1929 AD 100 at 104: "[T]he Governor-General-in-Council ..., in accordance with sec. 13 of the South Africa Act, is the Government of the Union of South Africa in whom, according to sec. 122 of that Act is vested all Crown Land..."

<sup>137</sup> 2001 3 SA 1151 (CC) at par 41, see notes 114 – 123 and accompanying text above.

<sup>138</sup> As De Ville notes, there is even constitutional support for such an argument in s 39(3) of the Constitution, which recognises the continued existence of "other rights or freedoms that are recognised or conferred by common law": *Judicial Review of Administrative Action in South Africa* 93. See also Pretorius (2002) 119 SALJ 374 at 385 note 68.

<sup>139</sup> *M v Home Office* [1994] 1 AC 377, [1993] 3 WLR 433, [1993] 3 All ER 537 (HL) at 566. Wade in Sunkin & Payne (eds) *The Nature of the Crown* 24; Loughlin in Sunkin & Payne (eds) *The Nature of the Crown* 48 – 64; Wade (1992) 142 *New LJ* 1315; Harris (1992) 108 *LQR* 626 at 635; Daintith in Jowell & Oliver (eds) *The Changing Constitution* 195; Emery & Smythe *Judicial Review: Legal Limits of Official Power* 12; Oliver 1987 *Public Law* 543 at 552; Winterton *Parliament, the Executive and the Governor-General* 121 – 122; Mathieson (1992) 15 *New Zealand Universities LR* 117.

<sup>140</sup> *M v Home Office* [1994] 1 AC 377, [1993] 3 WLR 433, [1993] 3 All ER 537 (HL) at 566; Wade in Sunkin & Payne (eds) *The Nature of the Crown* 24; Emery & Smythe *Judicial*

South African courts have, however, not been willing to extend to the state capacities or rights identical to those of other legal persons in all situations. In contrast to other legal subjects the state does not have similar personality rights such as *dignitas* and *fama* flowing from its legal personality.<sup>141</sup>

It remains an open question in South African law whether the state has a general capacity to act based on its legal personality, which would allow it to freely engage in commercial activity like other legal subjects. In the light of the Constitutional Court's approach to the state's property rights in *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others*<sup>142</sup> it seems highly likely that the courts will find such a general capacity.<sup>143</sup>

---

*Review: Legal Limits of Official Power* 12; Oliver 1987 *Public Law* 543 at 552; Arrowsmith *Civil Liability and Public Authorities* 53.

<sup>141</sup> *Die Spoorbond v South African Railways; Van Heerden v South African Railways* 1946 AD 999 at 1009; *Mthembi-Mahanyele v Mail & Guardian Ltd and Another* 2004 6 SA 329 (SCA) at pars 34 – 39 (confirming the “*Spoorbond* principle”, but cf par 64 where Lewis JA (in an obiter and minority remark) seems to suggest that the Government is not barred from suing for defamation because of a lack of personality rights, but rather because of a “special defence attaching to political information” causing such defamatory statements to be non-actionable); Burchell *The Law of Defamation in South Africa* 53. In this respect Wiechers suggests a particular public law treatment of the state's subjective rights, which, although they may be similar to those of other legal subjects, are not to be viewed as part of private law: *Administratiefreg* 86 note 94.

<sup>142</sup> 2001 3 SA 1151 (CC) at par 41.

<sup>143</sup> There are, however, a growing number of cases where the sources of state powers have been expressly limited to the Constitution and legislation, see *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1999 1 SA 374 (CC) at pars 53 – 59; *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 1 SA 141 (SE) at par 21; *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 6 SA 313 (SCA) at par 20; *Transnet Ltd and Others v Chirwa* 2007 2 SA 198 (SCA) at par 52 (per Cameron JA's minority judgement in respect of Transnet) and the discussion in par 3.1.2.3.2 below. De Ville *Judicial Review of Administrative Action in South Africa* 93 and Floyd (2005) 20 *SAPR/PL* 378 at 387 ostensibly unite these two approaches by arguing that the Constitution expressly preserves all common law rights and freedoms existing prior to the enactment of the Constitution. While De Ville bases his argument on s 39(3) of the Constitution, Floyd makes the more general argument that both the 1993 Constitution and the 1996 Constitution “provide



### 3.1.2.3 Limited or unlimited capacity

The recognition of a general common law commercial capacity residing in the state raises a number of concerns regarding the legal regulation of such capacity and resultant activity. One of the main problems is the potentially unlimited nature of the capacity.<sup>144</sup> If the state has an unlimited power to conclude contracts it may result in the state being able to isolate its actions or whole programmes from both legislative and judicial control.<sup>145</sup> The state will be able to avoid effective control by the legislature since statutory authorisation is no longer a necessity.<sup>146</sup> Such a possibility raises obvious concerns in a representative democracy such as South Africa where parliamentary elections is the primary vehicle of representation (at least at

---

that all law which was in force when the constitutions took effect continues in force to the extent that it is consistent with the specific constitution...” This, it is argued, allows the continued existence of the state’s common law power to contract *in terms of* the Constitution. This argument breaks down when one keeps in mind that in terms of the Diceyan view of the prerogative that governed the state’s common law powers in South Africa prior to the enactment of the 1993 Constitution, the state’s power to contract was a prerogative power and not some common law non-prerogative power. Since the prerogative powers were abolished by the 1993 Constitution any common law state power to contract that existed prior to the enactment of the 1993 Constitution cannot continue to exist by means of s 39(3) or the saving provisions relied on by Floyd. See also note 170 below for further problems with this argument.

<sup>144</sup> Arrowsmith *Civil Liability and Public Authorities* 54 (noting that despite the difficulties raised by such unlimited power to contract, it is “probably too well entrenched for judicial alteration”); Hogg *Liability of the Crown* 121. Floyd (2005) 20 *SAPR/PL* 378 also argues in favour of an unlimited state power to contract.

<sup>145</sup> See Jowell in Jowell & Oliver (eds) *The Changing Constitution* 13 – 15, 21.

<sup>146</sup> Although Parliament also exercises other forms of control over the administration, such as budgetary oversight and ministerial responsibility, these are often more illusionary than real forms of control. On legislative control over executive government in South Africa generally see Hoexter *Administrative Law in South Africa* 69 – 75, who notes at 70 that legislative control over executive action is not particularly strong and that the “South African legislature ... has effectively become the least powerful branch of government.”

national level).<sup>147</sup> Judicial control of executive action may also be greatly compromised if the state should utilise its commercial or contractual powers to implement policy rather than more formal instruments.<sup>148</sup>

### 3.1.2.3.1 Conditional legal capacity

In order to restrict the potentially unlimited commercial capacity of the state, which emerges from the legal personality theory discussed above, some commentators suggest a number of restrictive conditions on the state's power as legal subject.<sup>149</sup> In the South African context Breytenbach suggests three such conditions that should be placed on the state's common law capacity.<sup>150</sup> Firstly, the state may only act in a way that is "analogous or sufficiently similar to a natural person exercising the equivalent freedom."<sup>151</sup> However, it is not clear why the state is required to act analogous to natural persons and not other legal persons, since the state is surely more equivalent to legal persons than natural persons. Another, more fundamental, problem with this condition is the argument that the state in reality never acts in a way that can be

---

<sup>147</sup> Breytenbach (1994) 5 *Stell LR* 276 at 278; Freedland 1994 *Public Law* 86 at 94. See also Mathieson (1992) 15 *New Zealand Universities LR* 117 at 142: "In the long history of political debate one recurrent theme is the nature of the state. Is it to be socialistic? Or should 'free enterprise' be given full rein? Should the government be involved in setting up a chain of grocery shops or become active in other commercial areas in competition with private organizations? Or even if no profit-making or commercial competition is involved? The high principle at stake is whether the choice between these competing philosophies, or the selection of a balance between them, is to be made, or remade, by the majority of the elected representatives of the people in parliament assembled, or by the Cabinet or individual members of it in the name of the Crown. The alleged common law powers of the Crown detract from parliament's authority not by diminishing its 'sovereignty' but merely by removing a few of the most crucial decisions taken in a western democracy from its purview."

<sup>148</sup> Harris (1992) 142 *LQR* 626 at 636 – 637, 645 – 647; Daintith in Jowell & Oliver (eds) *The Changing Constitution* 194, 196-197, 216 – 218; Pretorius (2002) 119 *SALJ* 374 at 382. I shall return to this concern in more detail below.

<sup>149</sup> Breytenbach (1994) 5 *Stell LR* 276 at 281 – 282; Harris (1992) 142 *LQR* 626 at 635 – 636; Winterton *Parliament, the Executive and the Governor-General* 121 – 122.

<sup>150</sup> Breytenbach (1994) 5 *Stell LR* 276 at 281 – 282.

<sup>151</sup> Breytenbach (1994) 5 *Stell LR* 276 at 281.

described as “analogous or sufficiently similar to a natural person.”<sup>152</sup> As Breytenbach himself notes “even the most banal activities of government differ fundamentally from those of private individuals.”<sup>153</sup> The second condition Breytenbach proposes is that the state action taken in terms of its common law capacity should further the public interest and thirdly, that the expenditure related to any action be statutorily mandated.<sup>154</sup> The exact purpose of the last of these conditions is not exactly clear. In a footnote Breytenbach refers to a passage in *Halsbury’s Laws of England* where it is said that an appropriation Act may constitute implied authorisation for action that fulfils the purpose for which the money is appropriated.<sup>155</sup> If the purpose of the statutory appropriation condition is to postulate an implied statutory authorisation, it is not exactly clear why it is necessary to refer to *common law* capacity. The condition seems to negate the rule, that is of common law capacity, it is said to limit.<sup>156</sup> Furthermore, this third condition seems to bring in through the back door the requirement of appropriation that has long been rejected as a requirement for valid state contracting.<sup>157</sup> The conditions proposed do not seem to be particularly helpful.

### 3.1.2.3.2 Constitutional limits

If the South African state’s legal personality flows from the Constitution it follows that the limits of the commercial capacity based on such personality

---

<sup>152</sup> Harris (1992) 142 *LQR* 626 at 635 – 636.

<sup>153</sup> Breytenbach (1994) 5 *Stell LR* 276 at 282; see also Baxter *Administrative Law* 396: “It is unrealistic and constitutionally unwise to suggest that public authorities – whether they be the state or not – can ever act as private individuals in the modern world” [footnotes omitted]; Wiechers in Strauss (ed) *Huldigingsbundel vir WA Joubert* 281.

<sup>154</sup> Breytenbach (1994) 5 *Stell LR* 276 at 282.

<sup>155</sup> Breytenbach (1994) 5 *Stell LR* 276 at 282 note 180. However, he also refers to Australian case law that takes the opposite view.

<sup>156</sup> On implied statutory authorisation see further par 3.2.2 below.

<sup>157</sup> Floyd *Die Owerheidsooreenkoms – ‘n Administratiefregtelike Ondersoek* 263, 369, (2006) 21 *SAPR/PL* 161 at 169 – 171; Labuschagne *Staatskontrakte ter Verkryging van Goedere, Dienste en Werke* 31; Daintith (1979) 32 *Current Legal Problems* 41 at 43; Daintith in Jowell & Oliver (eds) *The Changing Constitution* 195; Hogg *Liability of the Crown* 121 – 124.

are also to be found in the Constitution. Section 41(1)(f) clearly states that: “All spheres of government and all organs of state ... must not assume any powers ... except those conferred on them in terms of the Constitution.” Read with the foundational principles of rule of law and legality, as developed by the Constitutional Court,<sup>158</sup> this section underpins the view that the Constitution remains the exclusive and ultimate source of all state power.<sup>159</sup> In *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council*<sup>160</sup> the Constitutional Court quoted with approval the following dictum of the Supreme Court of Canada:<sup>161</sup>

Simply put, the constitutionalism principle requires that all government action comply with the Constitution ... [government’s] sole claim to exercise lawful authority rests in the

---

<sup>158</sup> See *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1999 1 SA 374 (CC) at pars 53 – 59; *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) at pars 135 – 148; *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 2 SA 674 (CC) at pars 78 – 90; Hoexter (2004) 4 *Macquarie Law Journal* 165.

<sup>159</sup> Although the use of the term “public power” in all these judgements of the Constitutional Court may create the impression that the principles formulated in these cases apply only to a specific subset of state powers, ie public power as opposed to private power, it is clear from at least the judgements in *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1999 1 SA 374 (CC) and *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) that the label *public* is used to refer to the powers held by public authorities and not simply one part of those powers and that the principles applied in these cases indeed apply to the exercise of all state powers, see *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1999 1 SA 374 (CC) at pars 40, 58; *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) at par 132 footnote 86; *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 1 SA 141 (SE) at par 21: “The State and its organs have no powers outside that granted to it by the Constitution or by legislation complying with the Constitution”; Pretorius (2002) 119 *SALJ* 374 at 384. But cf *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 2 SA 674 (CC) at par 90 where the Court referred to “the exercise of all public power by members of the Executive and other functionaries” as if these organs of state may also have powers other than “public powers.”

<sup>160</sup> 1999 1 SA 374 (CC) at par 56.

<sup>161</sup> *In Reference re Secession of Quebec* [1998] 2 SCR 217 at par 72.

powers allocated to them under the Constitution, and can come from no other source.

Of the 243 sections in the Constitution, only sections 217, 218 and 230 have any direct bearing on the commercial capacity of the state. Section 217(1) reads:

When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

In its recent judgement in *Steenkamp NO v Provincial Tender Board, Eastern Cape*<sup>162</sup> the Constitutional Court read this provision as granting contractual capacity to a tender board in relation to the acquisition of goods and services on behalf of government, stating: “Section 217 of the Constitution is the source of the powers and function of a government tender board.”<sup>163</sup> This interpretation of section 217(1) is difficult to support. The wording and structure of the section seem to assume an existing capacity to contract, which is consequently subjected to specific requirements. In this regard section 217(1) is similar to section 33(1) of the Constitution, which guarantees “the right to administrative action that is lawful, reasonable and procedurally fair.” Section 33(1) cannot be read as itself an empowering provision that authorises administrative action. It is only a source of administrative law and not administrative power.<sup>164</sup> Similarly, section 217 is a source of public procurement *law*, but not one of public procurement *power*. Moseneke DCJ furthermore curiously restricted the contemplated grant of procurement power in section 217(1) to tender boards. Directly following the remark quoted above, the judge stated: “It [section 217(1)] lays down that an organ of state

---

<sup>162</sup> 2007 3 SA 121 (CC).

<sup>163</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 33 (footnotes omitted), see also par 20.

<sup>164</sup> On the importance of the difference between sources of administrative law and administrative power, see Burns & Beukes *Administrative Law under the 1996 Constitution* 73 – 74.

in any of the three spheres of government, *if authorised by law* may contract for goods and services on behalf of government.”<sup>165</sup> In this latter sentence the judge seems to contemplate an additional source of contractual capacity. It is difficult to reconcile these two sentences, especially since section 217(1) does not single out tender boards.<sup>166</sup> As an interpretation of section 217 the latter approach, which requires an additional source of authority to section 217 itself, is to be preferred.

In contrast to section 217 sections 218 and 230 of the Constitution expressly confer the capacity to enter into loan guarantees on national, provincial and local government and the capacity to raise loans on provincial and municipal government respectively.<sup>167</sup> Both provisions also set certain limits to the conferred capacity.<sup>168</sup> Apart from a number of provisions mandating legislation to confer powers on specific organs of state,<sup>169</sup> the remaining provisions relevant to the state’s commercial capacity are those dealing with the executive authority of the Republic of South Africa.<sup>170</sup> Two

---

<sup>165</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 33 (my emphasis).

<sup>166</sup> Moseneke DCJ’s express references to a tender board create the impression that he was in fact thinking of the predecessor of s 217 in the 1993 Constitution, viz s 187, which focused specifically on procurement by a tender board. Since the tender at issue in the case was awarded in 1995, it was in fact s 187 of the 1993 Constitution, rather than s 217 of the Constitution that applied. As a result the remarks regarding s 217 were obiter.

<sup>167</sup> Cf *Airconditioning Design & Development (Pty) Ltd v Minister of Public Works, Gauteng Province* 2005 4 SA 103 (T) at par 12.

<sup>168</sup> Both sections require the transactions to comply with conditions set out in national legislation enacted after consultation with the Financial and Fiscal Commission. Section 230 further restricts the use of loans for current expenditure to bridging purposes and to terms of 12 months.

<sup>169</sup> Sections 182(2) (Public Protector); 184(2) (Human Rights Commission); 185(2) (Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities); 187(2) (Commission for Gender Equality); 188(4) (Auditor-General); 190(2) (Electoral Commission); 210 (intelligence services); 225 (South African Reserve Bank). The powers granted by means of such legislation may include commercial powers.

<sup>170</sup> De Ville *Judicial Review of Administrative Action in South Africa* 93 suggests that s 39(3) of the Constitution can also be read as bearing on the capacity of the state. That section states: “The Bill of Rights does not deny the existence of any other rights or freedoms that are

provisions are of particular importance in this regard, namely sections 84 and 85. Section 85(1) vests the executive authority of the Republic in the President. Section 84(1) states: “The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of state and head of the national executive.” Although the first part of this section,<sup>171</sup> read with section 85(1), clearly restricts executive power to constitutional and legislative sources, it is not entirely clear what the impact of the second part of section 84(1)<sup>172</sup> is. The use of the word “including” in statutory provisions may be taken to indicate an illustrative, but

---

recognised or conferred by common law...” This section, it is argued, supports the existence of non-prerogative common law powers in the Blackstonian view of the prerogative. See note 143 above for criticism of this argument. However, a variation of this argument may be advanced in the present context to argue that since the Constitution clothes the state with legal personality, this section confers on the state all the powers of legal subjectivity enjoyed by legal persons at common law, ie unlimited capacity is thereby constitutionally granted (naturally subject to the Constitution). This means that despite other provisions of the Constitution limiting the state's capacity to those powers granted in the Constitution and legislation, this section nevertheless incorporates the pre-constitutional common law powers of the state into the Constitution. There are a number of problems with this argument. Firstly, s 39(3) is expressly limited to the Bill of Rights context. There is no indication that it has any application beyond the Bill of Rights so that it can be used to widen executive powers for example, as in the current context. Furthermore, the subsection only states that the *Bill of Rights* “does not deny the existence of any other rights or freedoms,” and not that the *Constitution* does not deny the existence of such rights or freedoms. As I will argue below, there are a number of provisions in the Constitution dealing specifically with executive powers that seem to deny the existence of such common law executive powers or freedoms outside the Constitution. This argument also finds support in the Constitutional Court's ruling in *President of the Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC) at par 8 that the (originally common law) prerogative powers did not survive constitutionalisation (see notes 109 – 112 and accompanying text above for a discussion of this case). Although the residual prerogative powers were vested in the State President by the former Constitutions, see notes 106 – 107 and accompanying text above, those provisions simply maintained the pre-existing common law prerogative powers, very similar to the function De Ville argues of s 39(3). The Constitutional Court's ruling in the *Hugo* case thus seems to rule out the effect of s 39(3) advanced by De Ville.

<sup>171</sup> “The President has the powers entrusted by the Constitution and legislation...”

<sup>172</sup> “[I]ncluding those necessary to perform the functions of Head of State and head of the national executive.”

not exclusive, list of a stated category<sup>173</sup> or as an extension of the preceding words or category.<sup>174</sup> In *R v Debele*<sup>175</sup> Fagan JA stated that the word “including” will have an extension role where the primary meaning of the term thus qualified is clear and requires no definition. In such a case the list following the word “including” will serve to broaden the primary meaning of that term to include items that would not otherwise be included.<sup>176</sup> This is the effect of the word “including” in section 84(1). The phrase preceding the word “including” in section 84(1), “powers entrusted ... by the Constitution and legislation,” is clear and requires no definition. The second part of section 84(1), following the word “including,” therefore adds to the first part, that is to the “powers entrusted ... by the Constitution and legislation.” Currie & De Waal argue convincingly that this expansion of presidential powers is to be understood by distinguishing between “powers” and “functions” as used in the Constitution and in particular sections 84 and 85.<sup>177</sup> Whereas the first part of section 84(1) grants the President those powers (expressly) entrusted to him by the Constitution and legislation, the second part further grants to the President the *powers* necessary to perform the *functions* entrusted to him by

---

<sup>173</sup> See *Commissioner for Customs and Excise v Capital Meats CC (In Liquidation) and Another* 1999 1 SA 570 (SCA) at 575. The context may, however, indicate that the list is exhaustive, see *Nkabinde v Nkabinde and Another* 1944 WLD 112 at 115; *R v Hurwitz* 1944 EDL 23 at 37.

<sup>174</sup> See *R v Debele* 1956 4 SA 570 (A) at 575 – 576; *R v Ah Tong* 1919 AD 186 at 189: “The word ‘include’ is often used ... for the purpose of enlarging the meaning of a word or phrase by bringing it under something which is not comprehended under the ordinary meaning of that word or phrase”; *Jones & Co v CIR* 1926 CPD 1 at 5: “ ‘includes,’ as a general rule, is not a term of exhaustive definition; ... as a general rule, it is a term of extension”; *Scottish Rhodesia Finance Ltd v Provincial Magistrate, Umtali, and Others* 1971 3 SA 234 (R) at 236; *Robb NO v Standard Bank Ltd and Another* 1979 2 SA 420 (R) at 428: “As a general rule [the word ‘including’] ... is used to enlarge the meaning of the words it follows and not as a term of exhaustive definition... I have no doubt that in its context, ‘including’ is used in an extensory sense. It enlarges the antecedent [category]...”

<sup>175</sup> 1956 4 SA 570 (A) at 575.

<sup>176</sup> See also *Scottish Rhodesia Finance Ltd v Provincial Magistrate, Umtali, and Others* 1971 3 SA 234 (R) at 236.

<sup>177</sup> Currie & De Waal *The New Constitutional and Administrative Law Volume I Constitutional Law* 235.



the Constitution and legislation. The executive powers of the state thus extend beyond those expressly granted by the Constitution and legislation, but are limited with reference to the functions granted by the Constitution and legislation.<sup>178</sup> At first glance this may seem to result in a significant limitation on the state's commercial capacity.

Section 85(2) continues to list the functions mandated by the Constitution as exercises of the executive authority. Of the five functions listed commercial action may arguably be mandated under at least four. Sections 85(2)(a) and (b) mandate the implementation of national legislation and national policy respectively. Commercial action may be one method of effecting such implementation.<sup>179</sup> For example, the state may decide to invest capital in black-owned companies in order to further its black economic empowerment policy or the state may enter into joint-venture property developments with private companies in order to fulfil its obligations under the Rental Housing Act.<sup>180</sup> Similarly, commercial action may be utilised to co-ordinate "the functions of state departments and administrations" as required by section 85(2)(c). Finally, section 85(2)(e) mandates "any other executive function provided for in the Constitution or in national legislation." This open-ended function may include commercial activity.

The analysis of the executive authority provisions in the Constitution raises a number of important points. It suggests that the state's commercial capacity is limited in source to the Constitution and legislation. However, it also indicates that such limitation is not (or may not be) as restrictive as one would imagine at first glance. Since the Constitution mandates relatively wide

---

<sup>178</sup> It may be possible to reach the same conclusion with a more restrictive reading of the word "including" in s 84(1) as "mean and include." This can be achieved by arguing that where the Constitution confers a function on the President the power to fulfil that function is impliedly conferred.

<sup>179</sup> See chapter three at par 3.5.3 below for a discussion of the policy dimension in state commercial activity and Baxter *Administrative Law* 421; Bolton *The Law of Government Procurement in South Africa* chapter 10; Arrowsmith, Linarelli & Wallace *Regulating Public Procurement* chapter 5.

<sup>180</sup> Act 50 of 1999. See for example s 2(1)(b), which states: "The Government must facilitate the provision of rental housing in partnership with the private sector."

*functions* and not specific action the methods at the state's disposal to execute such functions remain open-ended and may, as one option, include commercial action. On this argument the state's commercial powers become "facultative powers" or "derivative powers" relative to and depending on mandated primary functions.<sup>181</sup> When assessing the state's capacity to engage in a particular commercial action one therefore focuses on the purpose or substance behind the action, rather than its commercial form, and asks whether the state has the capacity or power to pursue that purpose. For example if the state purchases land in order to provide housing to those living in informal settlements, the power to enter into such contract of sale may be based on the state's (executive) function to provide housing in terms of section 26 of the Constitution, that is a section 85(2)(e) function.

The analysis above indicates that the state's common law capacity to engage in commercial activity is not unlimited. The analysis goes further to present an alternative basis for state commercial capacity.<sup>182</sup> In terms of this approach the state's capacity to engage in commercial activity can be viewed as a derivative power, which looks to the source of the function being fulfilled by the commercial action for a legal basis. Since the functions that the state may lawfully pursue are limited (and grounded) by the Constitution the source of the state's commercial capacity is likewise ultimately found in the Constitution. In terms of this approach there seems to be no further need for either the Blackstonian common law approach or theories of legal personality.<sup>183</sup>

---

<sup>181</sup> See Bolton *The Law of Government Procurement in South Africa* 80 and for similar (but not identical) arguments in the Australian context see Seddon *Government Contracts* 60 – 62 as well as Mathieson (1992) 15 *New Zealand Universities LR* 117.

<sup>182</sup> See also par 3.2.2 below on the related discussion of implied statutory powers.

<sup>183</sup> Currie & De Waal *The New Constitutional and Administrative Law Volume I Constitutional Law* 236 also note that this approach does away with the need for reliance on the common law or prerogative as a source of executive power. This is also illustrated by the judgement in *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 3 SA 1151 (CC) where the state's power to establish a transit camp for flood victims on state land was at issue. The court's finding that the state had authority for its actions in terms of its constitutional duties under s 26 made the court's reliance on common law powers

## 3.2 Legislation

### 3.2.1 Express powers

The most important statutory source of state commercial powers is the State Tender Board Act.<sup>184</sup> In terms of section 2 of that Act a national body, the State Tender Board, is created and is clothed with the power to:

procure supplies and services for the State, and, subject to the provisions of any other Act of Parliament, to arrange the hiring or letting of anything or the acquisition or granting of any right for or on behalf of the State, and to dispose of movable State property, and may for that purpose on behalf of the State, conclude an agreement with a person within or outside the Republic for the furnishing of supplies and services to the State or for the hiring or letting of anything or the acquisition or granting of any right for or on behalf of the State or for the disposal of movable State property.<sup>185</sup>

Given the wide range of these powers and in particular the phrase “the acquisition or granting of any right”, very few commercial transactions will fall outside the scope of the State Tender Board’s powers. One clear exclusion from these powers is transactions involving immovable state property. Such transactions are generally governed by the Land Affairs Act<sup>186</sup> and the State Land Disposal Act.<sup>187</sup> Although the Land Affairs Act<sup>188</sup> clearly presupposes the power vested in the Department of Public Works to acquire and lease land,<sup>189</sup> that Act does not grant such power to the Department. In contrast,

---

of property owners and the subsequent resurrection of the Blackstonian view of the prerogative unnecessary.

<sup>184</sup> Act 86 of 1968.

<sup>185</sup> State Tender Board Act 86 of 1968 s 4(1).

<sup>186</sup> Act 101 of 1987.

<sup>187</sup> Act 48 of 1961.

<sup>188</sup> Act 101 of 1987.

<sup>189</sup> This presumption is clear from s 6 of the Act of which the first subsection reads: “(1) Subject to the directions of the Minister [of Public Works], the [Land Affairs] Board shall

the State Land Disposal Act<sup>190</sup> expressly grants the President the powers to “sell, exchange, donate or lease any State land on behalf of the State” on “such terms and conditions as he may deem fit.”<sup>191</sup>

In addition to the general statutory provisions noted above there are a large number of statutes granting a variety of commercial powers to specific organs of state for their own specific purposes.<sup>192</sup> One worth mentioning is the National Supplies Procurement Act.<sup>193</sup> This Act grants a wide range of commercial powers to the Minister of Trade and Industry.<sup>194</sup> Apart from contractual powers<sup>195</sup> the Act also empowers the Minister to “manufacture or produce ... any goods for the State”<sup>196</sup> and to arrange for transport and insurance in relation to goods manufactured or acquired in terms of the Act.<sup>197</sup>

It is significant to note the underlying public purpose or public interest condition placed on most of these express statutory commercial powers. Some of the statutes contain express provisions placing such public interest conditions on the granted powers.<sup>198</sup> In other instances the condition seems

---

determine the amounts of compensation, purchase prices or rents payable in respect of immovable property which is expropriated, purchased or leased by the Department [of Public Works] for public purposes ...”

<sup>190</sup> Act 48 of 1961.

<sup>191</sup> State Land Disposal Act 48 of 1961 s 2(1).

<sup>192</sup> See Penfold & Reyburn in Woolman et al (eds) *Constitutional Law of South Africa* 25-24 – 25-25 for examples of procurement powers other than those of the State Tender Board and Scheepers in Joubert (ed) *The Law of South Africa* volume 14 (first reissue) pars 25 – 26, 34, 43 for a discussion of various statutes granting powers to specific bodies in relation to state land. See also National Environmental Management: Protected Areas Act 57 of 2003 s 80.

<sup>193</sup> Act 89 of 1970.

<sup>194</sup> National Supplies Procurement Act 89 of 1970 s 2.

<sup>195</sup> National Supplies Procurement Act 89 of 1970 s 2(a)(ii) and (iii).

<sup>196</sup> National Supplies Procurement Act 89 of 1970 s 2(a)(i).

<sup>197</sup> National Supplies Procurement Act 89 of 1970 s 2(v).

<sup>198</sup> See Sea Shore Act 21 of 1935 s 3(1) regarding the state’s power to let parts of the sea shore, the Land Affairs Act 101 of 1987 s 6(1) regarding the powers of the Land Affairs Board and the National Supplies Procurement Act 89 of 1970 s 2 regarding the security purpose of the powers granted to the Minister of Trade and Industry in that Act.

to be implied.<sup>199</sup> South African courts have also shown a willingness to attach such a condition to state commercial powers.<sup>200</sup>

An important alternative vehicle of state commercial powers is state owned enterprises (“SOEs”). These bodies are statutorily created and expressly clothed with commercial powers.<sup>201</sup> They are created as separate legal entities from the state, but subject to complete state control.<sup>202</sup> Apart from the fact that SOEs are granted wide commercial powers the relationship between them and the state is mostly structured in commercial form.<sup>203</sup> The relevant statutes thus grant the state commercial capacity on two levels. Firstly, in an indirect fashion by clothing the created SOE with commercial

---

<sup>199</sup> The public purpose condition on the Land Affairs Board’s powers in s 6(1) of the Land Affairs Act 101 of 1987 may be read as an implied condition on the Department of Public Work’s commercial powers to which the Land Affairs Board’s powers relate. On implied powers see further par 3.2.2 below.

<sup>200</sup> See *Vulindlela Furniture Manufacturers (Pty) Ltd v MEC, Department of Education and Culture, Eastern Cape, and Others* 1998 4 SA 908 (TK) at 928 regarding a provincial tender board’s powers; *Umfoloji Transport Bpk v Minister van Vervoer en Andere* 1997 2 All SA 548 (SCA) at 548 where Howie JA referred to contracting by the State Tender Board as “besteding van openbare gelde in die openbare belang deur ’n openbare liggaam” (spending of public money in the public interest by a public body (my translation)).

<sup>201</sup> See eg Management of State Forests Act 128 of 1992 sections 2 & 4; Alexkor Limited Act 116 of 1992 s 2 (read with the Alexander Bay Development Corporation Act 46 of 1989 sections 2 & 4); Eskom Conversion Act 13 of 2001 sections 3 – 7; Legal Succession to The South African Transport Services Act 9 of 1989 sections 2, 3, 19 & schedule 1; Diamonds Act 56 of 1986 chapter II part 2; Post Office Act 44 of 1958 sections 3, 4, 12W.

<sup>202</sup> See eg Management of State Forests Act 128 of 1992 s 2; Alexkor Limited Act 116 of 1992 sections 2 & 4 (read with the Alexander Bay Development Corporation Act 46 of 1989 sections 2, 5, 17); Eskom Conversion Act 13 of 2001 sections 3 & 4; Legal Succession to The South African Transport Services Act 9 of 1989 sections 2 – 4, chapter IV; Post Office Act 44 of 1958 sections 5, 12V.

<sup>203</sup> The state retains control over the SOE by means of the shareholding in the enterprise and the working interaction between the SOE and the state is governed by agreements entered into between the two, see eg Management of State Forests Act 128 of 1992 sections 2 & 4; Alexkor Limited Act 116 of 1992 s 4; Eskom Conversion Act 13 of 2001 s 4; Legal Succession to The South African Transport Services Act 9 of 1989 sections 2 & 4; Post Office Act 44 of 1958 sections 5, 12U.

powers and secondly, by mandating the state to engage in various commercial activities vis-à-vis the SOE.

A critically important recent addition to the statutory framework governing state commercial activity is the Public Finance Management Act (“PFMA”).<sup>204</sup> As the short title of this Act indicates it focuses more on the control of state expenditure than on mandating commercial activity. However, a number of provisions in the PFMA are important regarding the state’s commercial capacity and deserve mention here. Section 15(3) grants the National Treasury very wide powers to “invest temporarily, in the Republic or elsewhere, money in the National Revenue Fund that is not immediately needed.” Apart from the temporary nature of such investments the form of this mandated commercial activity is not further circumscribed, which makes this power particularly wide in scope. Chapter 8 of the PFMA contains important provisions regarding state commercial activity pertaining to “Loans, Guarantees and Other Commitments.”<sup>205</sup> Section 66(1) restricts the state’s power to enter into a very wide range of commercial transactions<sup>206</sup> to statutorily authorised transactions.<sup>207</sup> Section 66(2) further restricts the persons authorised to enter into the said category of commercial transactions.<sup>208</sup> It is not clear whether section 66(2) merely places another condition on the exercise of the commercial powers at issue or whether that section in fact grants the power to enter into the defined category of transactions. Although the heading of section 66<sup>209</sup> suggests that that section

---

<sup>204</sup> Act 1 of 1999.

<sup>205</sup> PFMA chapter 8 heading.

<sup>206</sup> These are to “borrow money or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind that institution or the Revenue Fund to any future financial commitment.”

<sup>207</sup> In all cases at least by the PFMA and for “public entities” also by other legislation. “Public entities” include most state institutions, including SOEs, that engage in commercial activity, other than Government Departments. For a full list of these entities see Schedules 2 and 3 to the PFMA.

<sup>208</sup> As far as national Government is concerned such transactions need to be authorised by the Minister of Finance: PFMA s 66(2)(a) read with s 70.

<sup>209</sup> “Restrictions on borrowing, guarantees and other commitments.”

is only concerned with conditions of authorised transactions, sections 66(6)<sup>210</sup> and 71 to 73<sup>211</sup> seem to indicate that section 66(2) does grant the power to engage in the defined commercial action as well as determine conditions for the exercise of such power. Section 70(1) grants members of Cabinet the power to “issue a guarantee, indemnity or security” with the concurrence of the Minister of Finance<sup>212</sup> and section 74 authorises the Minister of Finance to convert or consolidate loans, which power may be used to enter into various financial transactions.

Finally, the State Liability Act<sup>213</sup> deserves mention. This Act does not grant the state power to engage in commercial activity, but imposes liability on the state when it does enter into lawful commercial transactions.<sup>214</sup> The Act, therefore, only applies to cases where the state already has authority to enter into the transaction in issue.<sup>215</sup> The importance of this Act for present purposes is the apparent equation of claims against the state with that of private persons in section 1.<sup>216</sup> This legislative approach to state liability by analogy with private individuals, with its long statutory history in South African law,<sup>217</sup> serves to focus the attention on the particular legislative conception of

---

<sup>210</sup> This subsection refers to the “power conferred in terms of” s 66(2).

<sup>211</sup> These sections all refer to the borrowing of money “in terms of” s 66(2)(a).

<sup>212</sup> PFMA sections 66 and 70 should be read with s 218 of the Constitution, which grants the power to all spheres of government to issue loan guarantees, see note 167 above and accompanying text.

<sup>213</sup> Act 20 of 1957.

<sup>214</sup> State Liability Act 20 of 1957 s 1.

<sup>215</sup> Section 1 of the State Liability Act 20 of 1957 speaks of “any contract lawfully entered into.” *Heilbron Town Council v Minister of Public Works* 1914 OPD 83 at 86; Beinart (1955) *BSALR* 21 at 58 (with reference to the current Act’s predecessor, the Crown Liabilities Act 1 of 1910, which was identical to the present Act in this respect.)

<sup>216</sup> *East London Western Districts Farmers’ Association and Others v Minister of Education and Development Aid and Others* 1989 2 SA 63 (A) at 69: “[W]ithin the limits of Act 20 of 1957 the liability of the state is coextensive with that of the individual citizen”; *South African Railways & Harbours v Edwards* 1930 AD 3 at 9.

<sup>217</sup> See the identical approach in s 1 of the Crown Liabilities Act 37 of 1888 (Cape); s 1 of the Crown Suits Act 14 of 1903 (Natal); s 1 of the Crown Liabilities Ordinance 51 of 1903 (Transvaal); s 1 of the Crown Liabilities Ordinance 44 of 1903 (Orange River Colony) and s 2 of the Crown Liabilities Act 1 of 1910.

state commercial activity as equivalent to that of private citizens from the earliest legislative interventions on state commercial action.

### 3.2.2 Implied powers

An important supplementary approach to the legislative basis of the state's commercial capacity is that of implied statutory powers. It is generally accepted that empowering statutes may, in addition to express authorisation, also grant powers to the state by implication.<sup>218</sup> In terms of the rules of statutory interpretation these implied powers are either a logical or necessary consequence of or ancillary or incidental to the powers expressly granted or they are reasonably required in the exercise of the expressly granted powers or functions.<sup>219</sup> In this way commercial capacity can be read into express statutory authorisation of various state powers and functions.<sup>220</sup> As noted above in the context of constitutional authorisation the state's commercial powers hence become "facultative powers" or "derivative powers."<sup>221</sup> The focus is no longer on the commercial form of the particular state action, but on the underlying legislative purpose it pursues.

It seems that at least as far as commercial activity of public bodies is concerned, South African courts scrutinise the reasonableness of the averred implication of powers closely. In *Johannesburg Municipality v Davies*<sup>222</sup> the

---

<sup>218</sup> Baxter *Administrative Law* 404 – 407; Wiechers *Administratiefreg* 217 – 221; De Ville *Judicial Review of Administrative Action in South Africa* 108 – 109; Hoexter *Administrative Law in South Africa* 42 – 45; *GNH Office Automation CC and Another v Provincial Tender Board, Eastern Cape and Another* 1998 3 SA 45 (SCA); *City of Cape Town v Claremont Union College* 1934 AD 414 at 420 – 421, 452 – 453.

<sup>219</sup> *City of Cape Town v Claremont Union College* 1934 AD 414 at 420 – 421; *Thornicroft v Salisbury Municipality* 1951 1 SA 559 (A) at 565; Baxter *Administrative Law* 404 – 405; De Ville *Judicial Review of Administrative Action in South Africa* 108 – 109; Hoexter *Administrative Law in South Africa* 42 – 45. See De Ville *Constitutional & Statutory Interpretation* 129 – 134; Devenish *Interpretation of Statutes* 84 – 88; Steyn *Die Uitleg van Wette* 208 – 214 for a detailed discussion of the relevant rules of statutory interpretation.

<sup>220</sup> Cf Baxter *Administrative Law* 395; Harlow & Rawlings *Law and Administration* 217.

<sup>221</sup> See note 181 above and accompanying text.

<sup>222</sup> 1925 AD 395.



municipal council carried on the business of manufacturer and vendor of ice to the general public. Davies contended that this activity of the council was *ultra vires* its statutory powers and applied for an interdict restraining the council from any further such activity. At trial the council defended its actions by claiming, *inter alia*, that these activities were “reasonably incidental to the carrying on of ‘cold storage works,’” which were statutorily mandated.<sup>223</sup> The court adopted a very strict approach to this argument and closely scrutinised the evidence submitted in support thereof, eventually rejecting the argument.<sup>224</sup> In the course of its finding the court made a number of points which weighed against the implied powers and indicated the circumspection with which it approached this argument. In concurrence with the court *a quo* Stratford AJA quoted with approval the following remarks by the trial judge:

Neither convenience to the council in the carrying on of its works, nor convenience to its customers who utilise its cold storage chambers, is sufficient to make the business of ice-making reasonably incidental to the cold storage business.<sup>225</sup>

Another important remark of the court was in regard to what may be called a spare capacity argument:

It is true that once the plant is installed to make the reserve there would probably be a waste of its full efficiency if it were not kept busy making ice. But this consideration alone is not sufficient to entitle the defendant to make and sell the larger quantity.<sup>226</sup>

It seems that the efficient utilisation of spare capacity will not be sufficient, at least not on its own, to find an implied statutory power. This point is significant since the spare capacity argument is one that is often found in support of state commercial activity.<sup>227</sup>

---

<sup>223</sup> *Johannesburg Municipality v Davies* 1925 AD 395 at 402.

<sup>224</sup> *Johannesburg Municipality v Davies* 1925 AD 395 at 407.

<sup>225</sup> *Johannesburg Municipality v Davies* 1925 AD 395 at 407.

<sup>226</sup> *Johannesburg Municipality v Davies* 1925 AD 395 at 404 – 405.

<sup>227</sup> See Seddon *Government Contracts* 63 – 65.

The spare capacity argument was also made in support of commercial activity challenged in *Bloemfontein Municipality v Bosrand Quarries (Prop) Ltd*.<sup>228</sup> It was, however, not necessary for the court to decide the point,<sup>229</sup> although Stratford JA in a dissenting opinion remarked favourably on finding implied powers on a spare capacity basis.<sup>230</sup> This case was not strictly about implied powers, but involved the question whether the express grant of commercial powers to the municipality fell within the scope of the Provincial Council's legislative competence.<sup>231</sup> That competence was limited to certain classes of subjects, the relevant one here being "the class of subjects of municipal institutions."<sup>232</sup> The court had to consider whether the power to sell "quarry products to private persons for their private use" fell within this class. The judgements are noteworthy and relevant for an inquiry into implied powers for the various remarks regarding the ostensible (inherent) limit to legitimate public activity. De Villiers CJ, for the majority, remarked:

In our opinion there is very real distinction both in fact and in law between authority to dispose, for use within the municipal area, of stone and gravel produced from quarries established for municipal purposes on the one hand, and authority to trade in articles of commerce or industry generally on the other. Quite clearly trading as such is not one of the functions of a municipality, municipal corporations being established for the purposes of local government and not for commercial purposes.<sup>233</sup>

Despite these remarks the majority judgement is a good illustration of how easily one can justify state commercial activity with reference to broad and generalised public interests. In finding that the commercial powers granted in the current instance do in fact fall within the circumscribed limits of public power, the judge said:

---

<sup>228</sup> 1930 AD 370.

<sup>229</sup> *Bloemfontein Municipality v Bosrand Quarries (Prop) Ltd* 1930 AD 370 at 379.

<sup>230</sup> *Bloemfontein Municipality v Bosrand Quarries (Prop) Ltd* 1930 AD 370 at 383.

<sup>231</sup> *Bloemfontein Municipality v Bosrand Quarries (Prop) Ltd* 1930 AD 370 at 376 – 377.

<sup>232</sup> *Bloemfontein Municipality v Bosrand Quarries (Prop) Ltd* 1930 AD 370 at 378.

<sup>233</sup> *Bloemfontein Municipality v Bosrand Quarries (Prop) Ltd* 1930 AD 370 at 380.

According to the conception, which prevails with us, of what is necessary or desirable in modern urban communities, municipal councils not only require stone and gravel for roads, streets, etc, but, in order to increase the amenities of the town (a factor not to be neglected), also require trees and plants for parks and other public places. Undertakings for the purpose of satisfying its own requirements may therefore properly be established by a municipal council. But the needs of the community do not necessarily end there. It may be desirable for municipal councils in the interests of the community to go further and to encourage the public in gardening and in improving their property in other ways, and in order to do so to supply them with trees, plants, gravel, stone, and other articles at fixed rates. As that would be done in the interests of the community, it must be considered to serve a useful urban or municipal purpose.<sup>234</sup>

Stratford JA, in his dissenting judgement, took a far less lenient view of the limits of public functions and excluded “all money making enterprises which owe their undertaking to the desire to make profits by trading,” describing such actions as “foreign to the functions of a municipality.”<sup>235</sup>

Implied statutory powers remain an important source of state commercial capacity, especially given the recent tendency in South Africa to legislate in broad functional terms.<sup>236</sup> It seems that South African courts are reluctant to locate commercial powers in mandated public functions and require a close link between averred impliedly authorised commercial action and express public mandate. The Constitution added another layer to the discovery of implied powers by, on the one hand, restricting executive functions<sup>237</sup> and, on

---

<sup>234</sup> *Bloemfontein Municipality v Bosrand Quarries (Prop) Ltd* 1930 AD 370 at 379.

<sup>235</sup> *Bloemfontein Municipality v Bosrand Quarries (Prop) Ltd* 1930 AD 370 at 383.

<sup>236</sup> See Hoexter *Administrative Law in South Africa* 24.

<sup>237</sup> See par 3.1.2.3.2 above.

the other hand, creating a large range of state obligations that may serve as bases for implied executive powers.<sup>238</sup>

#### 4 Conclusion

The analysis of the historical development of the state's commercial capacity from the early days of VOC administration at the Cape to the present day reveals a number of important points that impact on the current conception of state commercial action in South African law.

The early VOC administration at the Cape was in the nature of a private commercial enterprise that administered the settlement for the financial gain of the company, albeit a company with public powers held on concession from the Dutch States General. The commercial actions of this administration were those of a private legal person and not of a truly public body in the present day sense. Consequently, the conception of state commercial actions as equivalent to that of private legal subjects was established in South African law from its earliest development, because of the very legal nature of the VOC.

It is not clear whether Roman Dutch law or English law constitutes the source of South African constitutional common law. Although there are strong arguments in favour of English law as the applicable source, there are also some indicators pointing to Roman Dutch law. The best approach is probably that the character of the state, as legal successor to the Crown, which includes its capacities, immunities and powers, is governed by English law (traditionally as part of the royal prerogative), while the relationships in which the state stands are either governed by Roman Dutch or English law

---

<sup>238</sup> Especially the socio-economic rights provisions in the Constitution seem likely sources for such implied powers given the relatively broad and open-ended obligations many of these place on the state. See the progressive realisation obligations with respect to the right to housing in s 26(2), the right to health care, food, water and social services in s 27(2) and the right to education in s 29(1) of the Constitution. Cf *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 3 SA 1151 (CC) where the state's obligations under s 26 of the Constitution clearly played a key role in finding the state's powers to act. See also De Ville *Judicial Review of Administrative Action in South Africa* 109.

depending on the type of relationship. In terms of this approach the state's capacity to contract (and generally participate in commerce) at common law would be determined by English law, but the action itself (the contract) and the relationships flowing from such commercial action would be largely governed by Roman Dutch law. This approach to the common law sources may help explain why South African positive law experienced the need for a distinction between different aspects or categories of state contracting in the absence of different private and public law jurisdictions as found in some European legal systems such as those of Germany and France.

In South Africa the Diceyan view of the English law prerogative was traditionally followed, holding that the prerogative encompasses all the non-statutory powers of the state, which would include the state's commercial powers. These prerogative powers were maintained in South African law in successive Constitutions up to 1994. They did not survive the enactment of the 1993 Constitution. However, in *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others*<sup>239</sup> the Constitutional Court resurrected the Blackstonian view of the prerogative in South African law and opened the door to common law sources of state powers equivalent to that of private individuals.

The state is assigned legal personality in South African law, but no coherent concept of state legal personality has developed. It is arguable that general commercial capacity may be part of the legal personality of the state.

In an attempt to limit the potentially unlimited nature of (common law) state powers flowing from its legal personality, some authors suggest that conditions be attached to those powers or the exercise of those powers. However, none of the proposed conditions is particularly convincing.

The Constitution provides an alternative basis for state commercial capacity. Especially sections 84 and 85 are important in establishing the state's commercial powers. In terms of these sections commercial powers may be seen as "facultative powers" or "derivative powers" that the state may

---

<sup>239</sup> 2001 3 SA 1151 (CC) at par 41.

use in order to fulfil constitutionally mandated functions. The Constitution as supreme law allows no further powers in the hands of the state.

Legislation remains the most significant direct source of state commercial powers. A large number of statutes expressly grant the state, in various institutions, a variety of commercial powers. Apart from the powers expressly granted by statute South African courts have also recognised powers impliedly granted by legislation. In the context of commercial powers the courts are, however, more reluctant to acknowledge such implied authorisations. The inherent public nature of the state seems to play some role in the courts' reluctance to find implied commercial powers. However, case law also illustrates that much depends on how wide public purpose is defined and that the scope of the state's commercial powers can be significantly extended by an increasingly wider view of public purpose.

From the discussion above it can be concluded that the historical development of the state's capacity to engage in commercial activity has resulted in a conceptualisation of the state as equivalent to private individuals in these commercial settings. Various theories can be used to explain this private side of the state, some of which has even found their way into the new constitutional dispensation in South Africa. However, the Constitution sets the limits of these powers in relation to restricted executive functions. State commercial powers cannot amount to more than mechanisms for the realisation of constitutionally mandated functions. This holds significant implications for the current treatment of state commercial action in South African law. At the most basic level it means that state commercial action can never be divorced from constitutional and hence public functions.

## CHAPTER THREE

### THE CLASSIFICATION APPROACH

#### 1 Introduction

Judicial regulation of state commercial activity in South African law is based on a classification approach. The basic premise of this approach is that all state legal action can be classified as either private or public in nature and as a result subject to private or public law regulation respectively. An important aspect of the classification approach is that the identity of the actor as the state is not dispositive in the judicial regulation of the specific action under scrutiny; some state commercial action will be subject to public law rules and some to private law rules, depending on the classification of the action at stake.

The quintessential illustration of the classification approach in South African law is the judicial regulation of state action in terminating a contract. Such action may either be treated as private in nature and thus subject to purely contractual regulation<sup>1</sup> or as public in nature and accordingly subject to public law regulation, mostly in the form of administrative law.<sup>2</sup> This chapter focuses on the judicial approach to regulating state commercial activity based on the premise that state action is subject to either private law regulation or public law regulation, depending on the classification of the particular action under scrutiny.

---

<sup>1</sup> See eg *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC 2001 3 SA 1013 (SCA), discussed in par 3.2.4 below.

<sup>2</sup> See eg *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA), discussed in par 3.3.1 below. To classify the state action as administrative action does not mean that it is not *also* contractual in nature, it is simply not *purely* contractual, ie purely private law regulated. Another good illustration of this approach is the contrasting judicial treatment of a public authority's withdrawal of its consent to a departure from a zoning scheme; compare *De Vroeg en 'n Ander v Stadsraad van Randburg* 1970 2 SA 132 (T) and *Transvaalse Raad vir die Ontwikkeling van Buite-Stedelike Gebiede v Steyn Uitzicht Beleggings (Edms) Bpk* 1977 3 SA 351 (T), discussed in par 3.4.1 below.

The criteria used to classify the nature of the action under the classification approach have varied over time. The analysis of the case law below reveals that the following criteria are used, either independently or in combination:

- the identity of the actor;
- the source of the power exercised;
- the use of superior and/or state power in concluding the transaction;
- public interest in the particular action;
- the fulfilment of a public function; and
- the impact of the action, particularly on individual legal rights.

The most prominent criteria are currently the source of the power exercised and the presence of superior power, with the courts alternating between these two.

It should be obvious that this approach is closely linked to the public-private law dichotomy familiar to South African and other Western legal systems. However, in contrast to the traditional role of this dichotomy in South African law as an abstract doctrinal division (existing mostly only at a theoretical level),<sup>3</sup> the classification approach employs the same dichotomy between private and public to substantive or practical effect. In an analysis of the criteria that have developed over time under the classification approach, references to more general arguments in relation to the public-private dichotomy are hence not out of place and may assist in evaluating specific criteria.

The classification approach can also be viewed as a forceful example of what Karl Klare has described as “South African jurisprudential conservatism”.<sup>4</sup> It is a formalistic and conceptual approach to the regulation of state commercial activity where the form of the action or the conceptual label attached to it determines the judicial control of such action.<sup>5</sup> This

---

<sup>3</sup> See Hahlo & Kahn *The South African Legal System and Its Background* 116 – 117; Hosten *et al Introduction to South African Law and Legal Theory* 272 – 274; Baxter *Administrative Law* 56 – 57.

<sup>4</sup> Klare (1998) 14 *SAJHR* 146 at 169.

<sup>5</sup> See Hoexter (2004) 121 *SALJ* 595 at 597 – 599.



approach is at odds with what Klare calls “transformative constitutionalism” and the “new conceptions of judicial role and responsibility” contemplated by the Constitution.<sup>6</sup> In the analysis that follows, this chapter will point to the untenable formalism and conceptualism of the classification approach and seek to reveal it as part of the conservative South African legal culture which Klare has identified as constraining the aspirations of the new constitutional dispensation.<sup>7</sup> The analysis will also bring out the inherent indeterminacy<sup>8</sup> of the classification approach, which, in Cora Hoexter’s words, contradicts “the supposed advantages of formalism – that is, legal certainty and predictability.”<sup>9</sup> I will argue that in this respect the classification approach is fatally flawed as a way of regulating state commercial activity, since certainty and predictability are of fundamental importance in the commercial context.

The chapter starts with a brief discussion of the purpose of the classification of state action. This purpose may be substantive, procedural or both, with resultant practical implications. The classification is furthermore not only of significance in the context of state commercial activity, but may also serve a similar purpose in respect of private actors’ actions. The bulk of the chapter will consequently focus on the identification and analysis of the various criteria listed above that have developed in service of the classification approach. In this part of the chapter I will illustrate and assess the judicial use of each criterion in the context of regulating state commercial activity. In the final part of the chapter I will evaluate the classification approach in its entirety against the backdrop of the abovementioned purpose of the chapter. The conclusions drawn from the analysis will set the scene for

---

<sup>6</sup> Klare (1998) 14 *SAJHR* 146 at 150, 156; see also Hoexter (2004) 121 *SALJ* 595 at 599.

<sup>7</sup> Klare (1998) 14 *SAJHR* 146 at 168; see also Hoexter (2004) 121 *SALJ* 595 at 598 – 599.

<sup>8</sup> Indeterminacy is one of the central themes of both the Realist and Critical Legal Studies movements. It maintains that the law does not consist of single answers to problems which are stable and certain, but that there are always multiple answers to legal problems and that no legal rule or concept can thus ever be fixed or certain. See Trubek (1984) 36 *Stanford LR* 575 at 578; Gordon (1984) 36 *Stanford LR* 57 at 125; Singer (1984) 94 *Yale LJ* 1 at 9 *et seq*; Van Blerk (1996) 113 *SALJ* 86 at 90 – 91, *Jurisprudence An Introduction* 151; Kelman *A Guide to Critical Legal Studies* 3 – 4, 7, 245 – 246, 257 – 262.

<sup>9</sup> Hoexter (2004) 121 *SALJ* 595 at 599.

the rest of the study where alternatives to a classification approach will be investigated.

## 2 Purpose of the classification

The purpose for which specific action is classified as either public or private may differ from case to case. That purpose may be procedural as, for example, in France and Germany, where different jurisdictions apply to disputes depending on the nature or category of the action<sup>10</sup> or in England where, although there are no separate jurisdictions, different court procedures apply to public law disputes as opposed to private law disputes.<sup>11</sup> In South Africa the classification does not have significant procedural implications at present.<sup>12</sup>

However, the classification of state action as either public or private holds profound implications for the substantive rules of law that apply to it.<sup>13</sup>

---

<sup>10</sup> See chapter one at par 4.3.2.1 above in respect of the German system and at par 4.3.3.1 in respect of the French system.

<sup>11</sup> See chapter one at par 4.3.1.1 above; Wade & Forsyth *Administrative Law* 651 *et seq*; Craig in Taggart (ed) *The Province of Administrative Law* 209 – 210; Arrowsmith *Civil Liability and Public Authorities* 2, 20 *et seq*; Bailey 2007 *Public Law* 444 at 446 – 447; Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* 168 – 169.

<sup>12</sup> *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* 2006 2 All SA 175 (E) at par 61; Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* 168 – 169. There are some procedural implications at present, such as the time constraints imposed on the institution of judicial review proceedings in s 7(1) of PAJA, although these only apply to review in terms of PAJA, ie not all forms of public law disputes, and even then may either be extended by a court in a given case or are arguably unconstitutional due to the absence of any such restrictions in s 33 of the Constitution. However, the position may change in future when the specific rules of procedure for judicial review are made and implemented as envisioned by s 7(3) of PAJA. Depending on the nature of such rules, the resultant position in South Africa may be very similar to that in England, so that the distinction at issue here may also have significant procedural implications in South Africa.

<sup>13</sup> Craig argues that despite the level of formal jurisdictional or procedural distinctions between public and private law disputes recognised in a specific legal system, all legal systems do draw some substantive consequences from the classification of action or of a

In South Africa, at a very basic level, such classification may determine whether rules of administrative law or rules of contract law apply.<sup>14</sup> However, beyond this very basic level, the application of various specific substantive rules of law may hinge on the classification. In South African law, two sets of substantive rules that have developed in opposite directions serve as illustration. On the one hand, the rules of extinctive prescription were previously held to apply to state rights, depending on the classification of the state action in terms of which such rights accrued. In *Oertel and Others NNO v Director of Local Government and Others*<sup>15</sup> the full bench of the Transvaal Provincial Division of the High Court held that prescription will run against the state in respect of “rights acquired as a result of being engaged in commercial enterprises as opposed to activities to do with executive and administrative matters.”<sup>16</sup> However, on appeal, the Appellate Division rejected this distinction and held that extinctive prescription also runs against the state in

---

body as “public”. He states that “the characterisation of the institution as public, or the recognition that it wields public power, will lead to the application of *procedural and substantive norms* which differ in certain respects from those which apply to private undertakings.” Craig in Taggart (ed) *The Province of Administrative Law* 210 (emphasis in the original); Arrowsmith *Civil Liability and Public Authorities* 1 *et seq.* In the South African context, see Cockrell 1997 *Acta Juridica* 26 who notes “a conspicuous asymmetry” in South African law between substantive legal doctrines subjecting “public power” and “contractual power” to “judicial second-guessing” respectively. He states at 30 (omitting footnotes): “The asymmetry is particularly marked in the juxtaposition between public powers and contractual powers, since our courts have sometimes implied that it is only the former which will attract the application of rationality criteria” and at 31: “[M]y submission is that the law’s willingness to allow for the second-guessing of the exercise of powers on rationality grounds is considerably less enthusiastic in the context of contractual powers than in the context of public powers...”

<sup>14</sup> Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* 168 – 169.

<sup>15</sup> 1981 4 SA 491 (T) at 500.

<sup>16</sup> See also Wessels *The Law of Contract in South Africa* par 2777: “As a general rule, prescription did not, according to the common law, run against the Crown, but where debts were due the Crown as though it were a private individual, prescription would run against it.”

respect of so-called public law debts.<sup>17</sup> Regarding the application of the rules of extinctive prescription in South Africa, the classification of state action hence became irrelevant.

On the other hand, the opposite development occurred regarding the application of the rules of sovereign immunity. Formerly, a foreign sovereign could claim absolute immunity in South African law.<sup>18</sup> The nature of the action at issue was thus of no consequence; the mere identity of the actor as a foreign sovereign served to activate the application of the rules of sovereign immunity.<sup>19</sup> However, in *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique*<sup>20</sup> Margo J noted the acceptance of a restricted doctrine of sovereign immunity in various other jurisdictions.<sup>21</sup> Following this analysis, he concluded that the restricted doctrine of sovereign immunity was now the governing rule of international law and should be followed in South Africa.<sup>22</sup> In terms of this restricted doctrine, sovereign immunity extends only to acts of a governmental nature, but not to acts of a commercial nature.<sup>23</sup> The classification of state action

---

<sup>17</sup> *Oertel en Andere NNO v Direkteur van Plaaslike Bestuur en Andere* 1983 1 SA 354 (A) at 374 – 375.

<sup>18</sup> Dugard *International Law: A South African Perspective* 182.

<sup>19</sup> *De Howorth v The SS India* 1921 CPD 451 at 462; *Lendlease Finance Co (Pty) Ltd v Corporacion De Mercadeo Agricola and Others* 1975 4 SA 397 (CPD) at 404; Dugard *International Law: A South African Perspective* 182.

<sup>20</sup> 1980 2 SA 111 (T) at 120 – 124.

<sup>21</sup> The judge referred to the position in the United States of America and Canada, and specifically focused on the relevant developments in England and in particular the important judgment of Lord Denning MR in *Trendtex Trading Corporation v Central Bank of Nigeria* 1977 QB 529 (CA), where the restricted doctrine was accepted in English law.

<sup>22</sup> *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* 1980 2 SA 111 (T) at 124.

<sup>23</sup> *Trendtex Trading Corporation v Central Bank of Nigeria* 1977 QB 529 (CA) at 555; *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* 1980 2 SA 111 (T) at 124, 126; *Kafraria Property v Government of the Republic of Zambia* 1980 2 SA 709 (E) at 713; *The Akademik Fyodorov: Government of The Russian Federation and Another v Marine Expeditions Inc* 1996 4 SA 422 (C) at 441; Dugard *International Law: A South African Perspective* 181. This position is also now reflected in the Foreign States Immunities Act 87 of 1981 s 4.

consequently plays a central role in the application of the rules of sovereign immunity.

In systems with separate administrative law jurisdictions, such as France and Germany, the classification of state action as either private or public has an even more profound impact at a substantive level.<sup>24</sup> The existence of such parallel jurisdictions have necessarily led to the development of separate substantive rules applicable to action falling within each jurisdiction. It follows that the classification of the action in each instance will be crucial in determining which of these parallel sets of rules applies. While a specific matter in French law may thus undoubtedly be one of contract, the question still remains whether the substantive rules of *contrats administratifs* or *contrats de droit privé* apply,<sup>25</sup> the answer depending on the classification in the given case.

The relevance of the classification at issue here is not restricted to state action. The criteria or factors underlying this classification do not emerge only from cases where the conduct of public bodies is argued to be subject to private law, but also from the converse instances, namely where the conduct of private bodies is argued to be subject to public law rules. These latter cases, like those in the former category, are hence relevant in identifying the underlying criteria or factors that move courts to subject certain action to increased (public law) regulation rather than more deferential (private law) regulation.<sup>26</sup> In this context Julia Black raises the interesting example of the franchise relationship as a form of commercial dealings between private parties.<sup>27</sup> Although these relationships are based on a contract between private parties and are mostly treated as matters of commercial contract law, Black argues that “[t]his approach misses a crucial point. Such ... franchises are not simply commercial agreements between economic actors; they are instruments of regulation, of the exercise of state power, function and

---

<sup>24</sup> See Craig in Taggart (ed) *The Province of Administrative Law* 209.

<sup>25</sup> See chapter one at par 4.3.3.2 above.

<sup>26</sup> See generally Craig in Taggart (ed) *The Province of Administrative Law* 196.

<sup>27</sup> Black in Black, Muchlinski & Walker (eds) *Commercial Regulation & Judicial Review* 153.

control.”<sup>28</sup> She argues further that, because of the regulatory nature of action taken in terms of these franchises, public law principles should find application to such action and that some such application is discernible in recent English case law.<sup>29</sup> This example illustrates that the regulatory nature of the action at stake is a significant criterion in applying public law principles in a commercial setting. It further demonstrates that the classification approach is not relevant in cases of *state* commercial activity only and that the criteria used to effect the classification of action are not found only in cases involving the state.

### **3 Criteria used to classify state commercial action**

#### **3.1 Criterion 1: Identity of the actor**

##### **3.1.1 Limited relevance of the actor’s identity**

Although the classification approach is based on the basic premise that the nature of the action at issue rather than the identity of the actor determines the regulation applied to that action, the identity of the actor remains an important factor in the overall classification of the action. This is not surprising given the classical distinction between public and private law as regulating the action of the state and private parties respectively, that is, based on the identity of the actor. However, as I indicated in chapter two, there are many examples dating from the earliest days of colonial government in South Africa of the state acting in an ostensibly private manner and of such action being regulated by private law.<sup>30</sup> In terms of the classification approach that has subsequently developed, the identity of the actor is thus not dispositive in determining the regulation of the action at stake, but at the same time it is not entirely irrelevant and feeds into the classification as one factor.

Booyesen argues that the identity or status of the parties to an agreement “may be crucial in classifying a particular agreement as a private law contract,

---

<sup>28</sup> Black in Black, Muchlinski & Walker *Commercial Regulation & Judicial Review* 153.

<sup>29</sup> Black in Black, Muchlinski & Walker *Commercial Regulation & Judicial Review* 153 – 154.

<sup>30</sup> See chapter two at par 3.1.1 above.

a treaty, or a public law agreement.”<sup>31</sup> For example, it seems impossible for two state departments to contract with each other since they form part of the same legal person,<sup>32</sup> so that any ostensible agreement between such departments will have to be treated as something other than contract.<sup>33</sup> Similarly, the identities of two parties forming part of two respective sovereign states may elevate an otherwise commercial transaction to the level of an international law treaty.<sup>34</sup>

The judgement in *Scholtz v Cape Divisional Council*<sup>35</sup> effectively illustrates the role of the identity of the actor as criterion in the classification approach. In that case the Cape Divisional Council, as landlord, terminated a contract of lease with Scholtz upon notice in terms of the contract.<sup>36</sup> Upon Scholtz’s failure to vacate the premises, the Council applied for and obtained an order of ejectment.<sup>37</sup> Scholtz appealed against the order and argued that the contract contained an implied term prohibiting the Council from

---

<sup>31</sup> Booyesen (1984) 9 SAYIL 56 at 58.

<sup>32</sup> Basic contract law doctrine states that a contract can only be concluded between a minimum of two different legal persons, so that a person cannot contract with herself: Lubbe & Murray *Farlam & Hathaway Contract* 401; De Wet & Van Wyk *Kontraktereg & Handelsreg* 1, Van der Merwe *et al Kontraktereg: Algemene Beginsels* 240. Similar reasoning in English law has prevented the Framework Documents in terms of which the relationship between executive agencies (the so-called “Next Step agencies”) and their parent state departments are structured, from being classified as contracts; see Freedland 1994 *Public Law* 86 at 89; Harden *The Contracting State* 46; Arrowsmith *Civil Liability and Public Authorities* 52; Wade & Forsyth *Administrative Law* 48.

<sup>33</sup> This of course depends on how one conceptualises the state, viz as a single juristic person with numerous organs or as a collection or complex of a number of juristic persons, see chapter two at par 3.1.2.2 above.

<sup>34</sup> Booyesen (1984) 9 SAYIL 56 at 58. See also Dugard *International Law: A South African Perspective* 328 *et seq.*

<sup>35</sup> 1987 1 SA 68 (C).

<sup>36</sup> *Scholtz v Cape Divisional Council* 1987 1 SA 68 (C) at 69. Clause one of the contract read: “This lease shall be terminable on seven days notice in writing being given by either party to the other.” On 16 November 1984, the Council gave Scholtz notice that the lease was terminated in terms of clause one of the contract after the expiry of seven days and requested Scholtz to vacate the premises.

<sup>37</sup> *Scholtz v Cape Divisional Council* 1987 1 SA 68 (C) at 68.

terminating the lease “capriciously or arbitrarily or both”, that the Council’s notice of termination was given “capriciously or arbitrarily or both” and hence was of no force or effect.<sup>38</sup> Scholtz based his argument on the identity of the landlord as a public authority and argued that the present contract of lease was no “ordinary contractual relationship,” but a relationship based on the statutory obligations of the Council.<sup>39</sup> Consequently, Scholtz argued, in terms of the rules of administrative law, the Council could not act capriciously or arbitrarily and a term to that effect was implied in the contract.<sup>40</sup> The court rejected this argument and in a key passage stated:

[Scholtz’s] plea does not allege that a statutory power has been improperly exercised, but attacks the giving of notice, as the exercise of a contractual right, on the ground that it was so given in conflict with an implied term of the agreement between the parties. In order to interpret exactly the same words differently in two contracts merely because in one of them one of the parties is a government body, one would at the least have to import a true implied (as distinct from a tacit) term into the one, the existence of which could only depend on that identity (of one of the parties) not merely as an arm of government (since government bodies conclude ordinary commercial contracts daily) but an arm of government performing a statutory duty vis-à-vis the other party to the contract.<sup>41</sup>

The relevant but limited role of the identity of the landlord appears clearly from this passage. On the one hand, it is clear that the identity of the landlord as an organ of state was not sufficient to import public law principles into the relationship. On the other hand, the identity of the landlord as public authority, *in combination with* a statutory duty imposed on such public authority, would seemingly have moved the court to apply public law principles or, put another way, to have treated the relationship differently from

---

<sup>38</sup> *Scholtz v Cape Divisional Council* 1987 1 SA 68 (C) at 70.

<sup>39</sup> *Scholtz v Cape Divisional Council* 1987 1 SA 68 (C) at 70.

<sup>40</sup> *Scholtz v Cape Divisional Council* 1987 1 SA 68 (C) at 70.

<sup>41</sup> *Scholtz v Cape Divisional Council* 1987 1 SA 68 (C) at 73.



“an ordinary commercial transaction.” In the present instance, the court found no such statutory duty and the matter was dealt with as any other commercial transaction subject to private law regulation.<sup>42</sup>

### 3.1.2 Defining organs of state

The relevance of the identity of the actor in classifying action as subject to public law regulation becomes more apparent when one moves away from “obvious” or uncontroversial state actors to bodies existing at the fringes of the state. In approaching the regulation of state commercial activity, this is a critically important area, since it is fairly common for the state to participate in the market by means of commercial or private law institutions such as companies.<sup>43</sup> The very format of these actors suggests a private law setting.

---

<sup>42</sup> *Scholtz v Cape Divisional Council* 1987 1 SA 68 (C) at 73 – 74. For stringent criticism of this judgement, see Harris & Hoexter (1987) 104 SALJ 557; Hoexter (2004) 121 SALJ 595. Another good illustration of this role of the identity of the actor as classification criterion is to be found in the well-known line of cases dealing with dismissal of public sector employees. In judgements such as *Mokoena and Others v Administrator, Transvaal* 1988 4 SA 912 (W); *Mokopanele en Andere v Administrateur, Oranje Vrystaat, en Andere* 1989 1 SA 434 (O); *Moodley and Others v Minister of Education and Culture, House of Delegates, and Another* 1989 3 SA 221 (A); *Administrator, Transvaal and Others v Zenzile and Others* 1991 1 SA 21 (A); *Administrator, Transvaal and Another v Sibiyi and Another* 1992 4 SA 532 (A) (eg at 539: “As in the *Zenzile* case, here too, the employer was a public authority whose decision to dismiss involved the exercise of a public power”); *Ntshotsho v Umtata Municipality* 1998 3 SA 102 (Tk) and *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* 2006 2 All SA 175 (E) the identity of the employer as an organ of state clearly played a role in the application of administrative law rules to the dismissal at issue, but from these same judgements as well as when compared to other judgements such as *Langeni and Others v Minister of Health and Welfare and Others* 1988 4 SA 93 (W) it seems that the identity of the employer alone was not the sole factor in the classification of the dismissals as subject to public law principles, but something more was required for such classification. In *Langeni and Others v Minister of Health and Welfare and Others* 1988 4 SA 93 (W) at 101 Goldstone J said in this regard: “I might add that if these applicants were entitled to a hearing it would necessarily follow that any public body would be obliged to give every employee a hearing before dismissing him. That is plainly not the law.”

<sup>43</sup> In South Africa examples of such bodies abound, eg Telkom, Eskom, Transnet, Alexkor and Denel to name but a few. Friedmann (1948) 22 *The Australian Law Journal* 7 at 8; Griffith

However, a close look at the true identity of such structures quite often reveals that the actor is simply the state in another guise, necessitating careful scrutiny of such actor's actions in order to establish whether private law regulation is in fact appropriate. Classifying such bodies as organs of state may thus be an important first step in classifying their actions as subject to public law regulation. In other words, the identity of the actor is a crucial early factor in reaching the final conclusion regarding the classification of the action at stake.<sup>44</sup>

The identification of an actor as an organ of state is important for another reason. The tests used to establish whether a body, which at first glance is not obviously part of the state, is indeed an organ of state highlight some important factors influencing the application of public law regulation. In many ways the test for an organ of state duplicates the more specific classification exercise at stake here, namely the classification of specific action as subject to private or public regulation, of which the identity of the actor is only one relevant factor.

### **3.1.2.1 Under common law**

Wiechers identifies a number of tests at common law to establish whether a body is an organ of state and categorises these into two groups, viz formal and substantive tests.<sup>45</sup> The formal tests ask whether the body was created on state initiative, for example, directly in statute and/or whether the body forms part of the state hierarchy and is publicly funded.<sup>46</sup> An important factor in the formal tests is whether the state has control over the body and the

---

(1952) 9 *The University of Toronto Law Journal* 169; Cloete (1978) 13 *Journal for Public Administration* 1 at 5 – 6, 10 – 14, 17, 27 – 34; Moorthy (1981) 30 *International and Comparative Law Quarterly* 638; Booysen (1984) 9 *SAYIL* 56 at 62; Baxter *Administrative Law* 162 – 168; Boule, Harris & Hoexter *Constitutional and Administrative Law* 84; Arrowsmith *Civil Liability and Public Authorities* 18 – 20; Wade & Forsyth *Administrative Law* 141 – 146.

<sup>44</sup> Wiechers *Administratiefreg* 74.

<sup>45</sup> Wiechers *Administratiefreg* 74 – 77.

<sup>46</sup> Wiechers *Administratiefreg* 74 – 75; Baxter *Administrative Law* 100; Boule, Harris & Hoexter *Constitutional and Administrative Law* 194.

extent of such control.<sup>47</sup> If the state has the power to appoint officers of the body, to discipline staff and to dictate its course of action, the body is very likely to be an organ of state.<sup>48</sup> A separate corporate personality may indicate that the body is not an organ of state.<sup>49</sup> The substantive tests include looking at the function of the body and whether that function can be described as a public service and whether the body acts with state authority.<sup>50</sup> Another test would be to ask whether the body is ultimately under a duty to act in the public interest or whether it can simply act to its own (private) advantage.<sup>51</sup> None of the tests is, however, conclusive and a combination of factors in a given case will indicate whether the body is an organ of state or not.<sup>52</sup>

The common law approach is effectively illustrated in the judgement of Goldstone J in *Banco De Mocambique v Inter-Science Research and Development Services (Pty) Ltd*.<sup>53</sup> The respondent had obtained an order for attachment of assets to found, or alternatively to confirm, the jurisdiction of the Transvaal High Court in an action against the government of Mozambique.<sup>54</sup> Those assets included “moneys standing to the credit of Banco de Mozambique of Maputo in the books of account of the Bank of Lisbon ... Johannesburg.”<sup>55</sup> The attachment order was granted upon evidence placed before the court that the Banco de Mozambique was a state bank and that the

---

<sup>47</sup> Wiechers *Administratiefreg* 74 – 75; Booysen (1984) 9 SAYIL 56 at 63; Boule, Harris & Hoexter *Constitutional and Administrative Law* 194.

<sup>48</sup> Wiechers *Administratiefreg* 75.

<sup>49</sup> Booysen (1984) 9 SAYIL 56 at 63.

<sup>50</sup> Wiechers *Administratiefreg* 75 – 77; Baxter *Administrative Law* 100; Booysen (1984) 9 SAYIL 63. In Wiechers’s view this last test, viz the presence of state authority, is the most important test and often determinative of a body’s status as organ of state or not.

<sup>51</sup> Baxter *Administrative Law* 100, views this test as the most important.

<sup>52</sup> Wiechers *Administratiefreg* 74; Baxter *Administrative Law* 100.

<sup>53</sup> 1982 3 SA 330 (T).

<sup>54</sup> *Banco De Mocambique v Inter-Science Research and Development Services (Pty) Ltd* 1982 3 SA 330 (T) at 331.

<sup>55</sup> *Banco De Mocambique v Inter-Science Research and Development Services (Pty) Ltd* 1982 3 SA 330 (T) at 331.

relevant moneys consequently amounted to Mozambican state assets.<sup>56</sup> In the present application Banco de Mozambique argued that the attachment of the moneys should be set aside since it had not been proven that such moneys belong to the government of Mozambique.<sup>57</sup> The applicant argued that it

is a corporation separate and distinct from the Government [of Mozambique]; that it owns its own assets and contracts its own liabilities; and that, consequently, its assets cannot be attached at the instance of a creditor of the Government.<sup>58</sup>

In answer to this argument the respondent averred that the bank was an organ of state and that its assets consequently were state assets.<sup>59</sup> The court thus had to decide “upon the qualities which are necessary or sufficient to confer upon the applicant the status of a department or organ of government.”<sup>60</sup> Goldstone J quoted with approval the following extract from an article by VK Moorthy:<sup>61</sup>

The Courts have evaluated the relationship between the Government and a statutory corporation for the purpose of determining whether or not the corporation is a Government instrumentality by the application of various tests. The tests are as follows:

(1) Whether the body has any discretion of its own; if it has, what is the degree of control by the Executive over the exercise of that discretion;

---

<sup>56</sup> *Banco De Mocambique v Inter-Science Research and Development Services (Pty) Ltd* 1982 3 SA 330 (T) at 331 – 332.

<sup>57</sup> *Banco De Mocambique v Inter-Science Research and Development Services (Pty) Ltd* 1982 3 SA 330 (T) at 332.

<sup>58</sup> *Banco De Mocambique v Inter-Science Research and Development Services (Pty) Ltd* 1982 3 SA 330 (T) at 333.

<sup>59</sup> *Banco De Mocambique v Inter-Science Research and Development Services (Pty) Ltd* 1982 3 SA 330 (T) at 333.

<sup>60</sup> *Banco De Mocambique v Inter-Science Research and Development Services (Pty) Ltd* 1982 3 SA 330 (T) at 335.

<sup>61</sup> Moorthy (1981) 30 *International and Comparative Law Quarterly* 638.

- (2) whether the property vested in the corporation is held by it for and on behalf of the Government;
- (3) whether the corporation has any financial autonomy;
- (4) whether the functions of the corporation are Governmental functions.<sup>62</sup>

Goldstone J noted that control is the most important factor and that “if there is significant control, the functional test is of little or no importance.”<sup>63</sup>

In reaching his conclusion that the bank was an agent of the state and not an organ of state, Goldstone J listed the following characteristics of the bank as relevant:

- (a) It is a separate juristic entity which possesses its own assets;
- (b) it has a number of banking functions, the most important of which is that of the central and issuing bank of Mozambique;
- (c) it also carries on business as a commercial bank;
- (d) it is closely controlled by the Government and especially so in relation to its central and issuing banking activities;
- (e) it acts as banker not only to the Government, but also to other public institutions, including local authorities;
- (f) the day-to-day activities of the applicant are conducted by its own staff which is governed by a Government-appointed administration board;
- (g) the administration board acts independently of the Government which, however, has a right to veto any of its decisions;
- (h) the applicant, in its own name, enters into local and foreign contracts relating to State and private transactions.<sup>64</sup>

---

<sup>62</sup> *Banco De Mocambique v Inter-Science Research and Development Services (Pty) Ltd* 1982 3 SA 330 (T) at 333 – 334.

<sup>63</sup> *Banco De Mocambique v Inter-Science Research and Development Services (Pty) Ltd* 1982 3 SA 330 (T) at 334 referring to Moorthy (1981) 30 *International and Comparative Law Quarterly* 638 at 641.

Despite the fact that this judgement provides a good exposition of the tests applied at common law in South Africa to establish whether a body is an organ of state and the factors relevant to that determination, the judge's conclusion in the case is somewhat curious. The measure of government control over the bank seems to support a finding, on the tests set out by Goldstone J, that the bank was indeed an organ of state.<sup>65</sup> What did seem to influence Goldstone J was the fact that the bank engaged in commercial action, which stood apart from any governmental functions it fulfilled.<sup>66</sup>

### 3.1.2.2 In the Constitutions

Under both the 1993 Constitution and the Constitution the concept "organ of state" became of critical importance. It is a key concept in the application of the Constitution and was closely tied to the debate about the horizontal application of the 1993 Constitution.<sup>67</sup> Consequently, the 1993 Constitution included the term "organ of state" in its definition clause,<sup>68</sup> which stated: "[O]rgan of state' includes any statutory body or functionary." This was

---

<sup>64</sup> *Banco De Mocambique v Inter-Science Research and Development Services (Pty) Ltd* 1982 3 SA 330 (T) at 343.

<sup>65</sup> See also the criticism of this conclusion raised by Booysen (1984) 9 SAYIL 56 at 63 note 43, where the author argues that the acts of an agent are in any case attributable to the principal, so that it would not make a significant difference for a body to be characterised as an agent of the state rather than an organ of state, especially with regard to agreements. Furthermore, Moorthy, upon which Goldstone J relied heavily in his judgement, uses the term "agent of the state" as equivalent to "organ of state"; see eg Moorthy (1981) 30 *International and Comparative Law Quarterly* 638 at 638 – 639, 657 ("As an agent or servant of Government PETRONAS will be entitled to claim the privilege of non-disclosure of documents or oral evidence of the contents of documents relating to affairs of the State...").

<sup>66</sup> See especially the judge's application of the "tests suggested by Mr Moorthy": *Banco De Mocambique v Inter-Science Research and Development Services (Pty) Ltd* 1982 3 SA 330 (T) at 344; Booysen (1984) 9 SAYIL 56 at 63.

<sup>67</sup> Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* 112 – 113; Rautenbach & Malherbe *Constitutional Law* 70 – 71; Du Plessis 1994 TSAR 706 at 709 – 710; Venter (1995) 58 THRHR 379 at 385 – 389; Woolman in Woolman *et al* (eds) *Constitutional Law of South Africa* 31-16 *et seq.*

<sup>68</sup> 1993 Constitution s 233.

subsequently replaced by the definition in section 239 of the Constitution that reads:

'organ of state' means-

- (a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other functionary or institution-
  - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
  - (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

Any analysis of whether a body qualifies as an organ of state now has to start with this constitutional definition.

Two opposing views emerged regarding the test whether a body is an organ of state in terms of the definition in the 1993 Constitution. Although that definition has now been replaced by section 239 of the Constitution, the former debate is still of relevance, since the positions taken up in that debate have been carried over to the interpretation of the section 239 definition.<sup>69</sup>

In *Baloro and Others v University of Bophuthatswana and Others*<sup>70</sup> Friedman JP adopted an “extended meaning” of the term “organ of state,” relying on the views of Lourens du Plessis.<sup>71</sup> In that case the applicants, all foreign nationals, claimed that the University as their employer unfairly discriminated against them by denying them promotions based on their nationality.<sup>72</sup> They based their claim on the equality right in section 8 of the 1993 Constitution.<sup>73</sup> The respondent argued that, since it did not qualify as an

---

<sup>69</sup> Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* 114, 116 – 117; Rautenbach & Malherbe *Constitutional Law* 70 – 71.

<sup>70</sup> 1995 4 SA 197 (B) at 230, 236.

<sup>71</sup> Du Plessis 1994 TSAR 706.

<sup>72</sup> *Baloro and Others v University of Bophuthatswana and Others* 1995 4 SA 197 (B) at 208.

<sup>73</sup> *Baloro and Others v University of Bophuthatswana and Others* 1995 4 SA 197 (B) at 208.

organ of state, the Bill of Rights did not apply to it.<sup>74</sup> The court rejected this argument and found that the University did qualify as an organ of state,<sup>75</sup> which term

must include (i) statutory bodies; (ii) parastatals; (iii) bodies or institutions established by statute but managed and maintained privately, such as universities, law societies, the South African Medical and Dental Council, etc; (iv) all bodies supported by the State and operating in close co-operation with structures of State authority; and (v) certain private bodies or institutions fulfilling certain key functions under the supervision of organs of the State.<sup>76</sup>

In contrast to the wide approach to organs of state in the *Baloro* judgement, Van Dijkhorst J, with reference to the views expressed by Francois Venter,<sup>77</sup> adopted a much narrower test in *Directory Advertising Cost Cutters (Pty) Ltd v Minister for Post, Telecommunications and Broadcasting and Others*.<sup>78</sup> In this matter the applicant sought certain information from Telkom<sup>79</sup> regarding telephone directories published annually by that company.<sup>80</sup> It based its argument on its “right of access to all information held by the State or any of its organs at any level of government insofar as such information is required for the exercise or protection of any of his or her rights.”<sup>81</sup> In addressing the question whether Telkom qualified as an organ of state and was subsequently subject to the section 23 right, the judge stated:

---

<sup>74</sup> *Baloro and Others v University of Bophuthatswana and Others* 1995 4 SA 197 (B) at 209.

<sup>75</sup> *Baloro and Others v University of Bophuthatswana and Others* 1995 4 SA 197 (B) at 246.

<sup>76</sup> *Baloro and Others v University of Bophuthatswana and Others* 1995 4 SA 197 (B) at 236.

<sup>77</sup> Venter (1995) 3 *THRHR* 379.

<sup>78</sup> 1996 3 SA 800 (T) at 809 – 180.

<sup>79</sup> Telkom is the company to which the whole telecommunications enterprise of the state was transferred with the purpose of rendering the telecommunication service which the state had to that point fulfilled.

<sup>80</sup> *Directory Advertising Cost Cutters (Pty) Ltd v Minister for Post, Telecommunications and Broadcasting and Others* 1996 3 SA 800 (T) at 804 – 805.

<sup>81</sup> 1993 Constitution s 23.



In my respectful view, the definition of 'organ of State' adopted in *Baloro and Others v University of Bophuthatswana and Others* (supra) is far too wide. The concept as used in s 7(1) of the [1993] Constitution must be limited to institutions which are an intrinsic part of government - ie part of the public service or consisting of government appointees at all levels of government - national, provincial, regional, and local - and those institutions outside the public service which are controlled by the State - ie where the majority of the members of the controlling body are appointed by the State or where the functions of that body and their exercise is prescribed by the State to such extent that it is effectively in control. In short, the test is whether the State is in control.<sup>82</sup>

This test, the control test, is clearly much narrower than the one adopted in the *Baloro* judgement. It is also closely aligned to the formal tests applied at common law to determine whether a body is an organ of state. Despite this narrow test, the judge found that Telkom was indeed an organ of state.<sup>83</sup> The fact that Telkom was an incorporated company with an independent juristic existence made no difference in the judge's view.<sup>84</sup> He described Telkom as "a rather unusual" company and highlighted its statutory creation, the statutory nature and basis of its functions and, most importantly, the large measure of control that the state had over Telkom's action in terms of Telkom's empowering legislation.<sup>85</sup> It is interesting to note Van Dijkhorst J's following reaction to the argument that the state had no more power or control over Telkom than any other sole shareholder:

---

<sup>82</sup> *Directory Advertising Cost Cutters (Pty) Ltd v Minister for Post, Telecommunications and Broadcasting and Others* 1996 3 SA 800 (T) at 810.

<sup>83</sup> *Directory Advertising Cost Cutters (Pty) Ltd v Minister for Post, Telecommunications and Broadcasting and Others* 1996 3 SA 800 (T) at 811.

<sup>84</sup> *Directory Advertising Cost Cutters (Pty) Ltd v Minister for Post, Telecommunications and Broadcasting and Others* 1996 3 SA 800 (T) at 808.

<sup>85</sup> *Directory Advertising Cost Cutters (Pty) Ltd v Minister for Post, Telecommunications and Broadcasting and Others* 1996 3 SA 800 (T) at 807 – 808.

That argument misses the point. A sole shareholder has total control, as he can control the appointment of the directors who run the company. In addition, the State has the veto powers in terms of s 7(2) [of the Post Office Act 44 of 1958] and Telkom is bound hand and foot to the object of the State to render a public telecommunication service. Telkom's function is a function of the executive.<sup>86</sup>

It would seem that, although control is the most important factor in this narrow test, it is not the sole criterion. The public nature and statutory source of its functions remain important contributing factors, especially to distinguish institutions of a commercial character under state control from other similar bodies under analogous private control.

The control test has been applied in a substantial number of subsequent judgements<sup>87</sup> despite academic criticism of especially the narrow ambit of the

---

<sup>86</sup> *Directory Advertising Cost Cutters (Pty) Ltd v Minister for Post, Telecommunications and Broadcasting and Others* 1996 3 SA 800 (T) at 809. It is of interest to note the almost exactly opposite approach to the test for "organ of state" adopted by Yacoob J in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 1 SA 343 (CC) at par 40 *et seq.* There the judge expressly rejected an institutional approach to the definition of "organ of state" in favour of a functional approach. However, in establishing whether the Council in that case was fulfilling a public function, the judge highlighted government control over the Council and its functions. It seems that in the latter case government control resulted in a finding that the function was public, while in the former case the public function resulted in a finding that government had control.

<sup>87</sup> *Mistry v Interim National Medical and Dental Council of South Africa* 1997 7 BCLR 933 (D); *Wittmann v Deutscher Schulverein, Pretoria and Others* 1998 4 SA 423 (T) at 454; *Goodman Bros (Pty) Ltd v Transnet Ltd* 1998 4 SA 989 (W) at 995; *Claase v Transnet Bpk en 'n Ander* 1999 3 SA 1012 (T) at 1019; *Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust and Another* 1999 4 SA 375 (T) at 381; *Korf v Health Professions Council of South Africa* 2000 1 SA 1171 (T) at 1176 – 1178; *Nextcom (Pty) Ltd v Funde NO and Others* 2000 4 SA 491 (T) at 504; *Esack NO and Another v Commission on Gender Equality* 2001 1 SA 1299 (W) at 1306; *Van Rooyen and Others v The State and Others* 2001 4 SA 396 (T) at 453; *Lebowa Mineral Trust v Lebowa Granite (Pty) Ltd* 2002 3 SA 30 (T) at 35 – 37; *Governing Body, Mikro Primary School, and Another v Minister of Education, Western Cape, and Others* 2005 3 SA 504 (C) at 513. Also cf *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 1 SA 343 (CC) at par 42 – 45.

test.<sup>88</sup> Adherence to the control test in these cases has led Van Dijkhorst J to conclude in a later case that “[i]t must therefore be concluded that the control test to determine whether a body is an organ of State is now generally accepted.”<sup>89</sup> This test has not been restricted to establish whether a body is an organ of state for purposes of the 1993 Constitution, but has also been applied in the context of the final Constitution. In *Korf v Health Professions Council of South Africa*<sup>90</sup> Van Dijkhorst J stated that “the more precise definition of ‘organ of State’ in s 239 of the Constitution was not intended to differ materially from the 1993 definition.” The judge consequently concluded that the control test remains the apposite test under the final Constitution.<sup>91</sup> Van Dijkhorst J is clearly wrong in this conclusion.<sup>92</sup> As Davis J rightly remarked in *Inkatha Freedom Party and Another v Truth and Reconciliation Commission and Others*<sup>93</sup> with express reference to bodies qualifying as organs of state in terms of Van Dijkhorst J’s control test:

The definition of organ of State in the 1996 Constitution expands the definition beyond such institutions for it includes within the definition those institutions or functionaries who might otherwise be outside of the State but which exercise public power.

Davis J captured the essence of this expansion effectively when he stated with reference to paragraph (b) of the definition of organ of state in section

---

<sup>88</sup> Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* 118 – 119; Rautenbach & Malherbe *Constitutional Law* 71; Currie & De Waal *The Bill of Rights Handbook* 48; Woolman in Woolman *et al* (eds) *Constitutional Law of South Africa* 31-105, 31-106.

<sup>89</sup> *Lebowa Mineral Trust v Lebowa Granite (Pty) Ltd* 2002 3 SA 30 (T) at 35 (Van der Merwe J and Coetzee J concurring).

<sup>90</sup> 2000 1 SA 1171 (T) at 1177.

<sup>91</sup> *Korf v Health Professions Council of South Africa* 2000 1 SA 1171 (T) at 1177 – 1178.

<sup>92</sup> In *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another* 2006 1 SA 1 (SCA) at par 20 the Supreme Court of Appeal expressly rejected this conclusion: “The Court a quo erred in adopting the reasoning of Van Dijkhorst J [in *Directory Advertising Cost Cutters*] and ascribing the same meaning to ‘organ of State’ in the Constitution as in the interim Constitution. Organ of State is differently and comprehensively defined in the Constitution.”

<sup>93</sup> 2000 3 SA 119 (C) at 133.

239 of the Constitution: “In this case the classification rests on an identification of the nature of power rather than the nature of the functionary or institution.”<sup>94</sup>

It would be wrong, however, to think that in all the cases, which nominally applied the control test the approach to defining an organ of state was an excessively narrow one restricted to formal factors of governmental control over the institution under consideration. In fact, Van Dijkhorst J’s approach in *Directory Advertising Cost Cutters (Pty) Ltd v Minister for Post, Telecommunications and Broadcasting and Others*<sup>95</sup> was itself not as narrow as he would have one believe. As noted above, factors such as the public nature and statutory source of the body’s functions were important contributing factors in the finding that Telkom was indeed an organ of state.<sup>96</sup> In *Directory Advertising Cost Cutters* the door was thus already left open to “a more generous and nuanced”<sup>97</sup> test by leaving some scope as to what state control entails. Plasket refers to two cases in which such a more nuanced approach was followed while seemingly adhering to the control test and calls this a third approach, the “benevolent control test”.<sup>98</sup> In these and other cases factors such as the statutory origin of the body and the public nature of its

---

<sup>94</sup> *Inkatha Freedom Party and Another v Truth and Reconciliation Commission and Others* 2000 3 SA 119 (C) at 132. See also Rautenbach & Malherbe *Constitutional Law* 71; Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* 120.

<sup>95</sup> 1996 3 SA 800 (T).

<sup>96</sup> *Directory Advertising Cost Cutters (Pty) Ltd v Minister for Post, Telecommunications and Broadcasting and Others* 1996 3 SA 800 (T) at 808, 810: “The meaning of ‘statutory body’ must in the context therefore be limited to those statutory bodies which have the characteristics of organs of State, ie that they act authoritatively in the exercise of a governmental function. Those who exercise such functions are subject to the control of the State.”

<sup>97</sup> Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* 117.

<sup>98</sup> Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* 117. These are *Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensioenfonds en 'n Ander* 1997 8 BCLR 1066 (T) and *Esack NO and Another v Commission on Gender Equality* 2001 1 SA 1299 (W).

powers and functions played an important role in informing the concept of control.<sup>99</sup> In further cases a narrow conception of control has been amplified with contributing factors in finding a body to be an organ of state, such as a statutory duty to perform its functions in the public interest<sup>100</sup> and the rendering of public services.<sup>101</sup>

The hold of a narrow control test in establishing whether a body is an organ of state in South African law has now been broken by the Constitutional Court judgement in *Independent Electoral Commission v Langeberg Municipality*.<sup>102</sup> In that case a local council challenged the Independent Electoral Commission's<sup>103</sup> refusal to set up a separate voting district or alternatively voting station for one of the towns within the council's area of jurisdiction.<sup>104</sup> One of the IEC's arguments was that the local council did not comply with the mandatory requirements of section 41(3) of the Constitution, which "requires an organ of State involved in an intergovernmental dispute to

---

<sup>99</sup> See Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* 117 – 118; *Nextcom (Pty) Ltd v Funde NO and Others* 2000 4 SA 491 (T) at 504 – 505; *Lebowa Mineral Trust v Lebowa Granite (Pty) Ltd* 2002 3 SA 30 (T) at 35 (per Van Dijkhorst J): "The objects of the trust set out in s 3 of the Act are all governmental objects..."

<sup>100</sup> *Goodman Bros (Pty) Ltd v Transnet Ltd* 1998 4 SA 989 (W) at 995: "Of particular importance are the provisions of ss 15 and 17 of that Act, that the respondent is required to provide a service 'that is in the public interest'; *Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust and Another* 1999 4 SA 375 (T) at 381: "[A]nd first respondent is bound to exercise its functions for the benefit of the inhabitants of Lebowa."

<sup>101</sup> *Claase v Transnet Bpk en 'n Ander* 1999 3 SA 1012 (T) at 1019: "Dit is duidelik dat eerste respondent ook 'n openbare diens verrig. Na my oordeel, is dit duidelik dat eerste respondent deur die Staat beheer word en 'n openbare funksie verrig" (It is clear that the first respondent also fulfils a public service. In my view, it is clear that the first respondent is controlled by the State and fulfils a public function (my translation and emphasis)).

<sup>102</sup> 2001 (3) SA 925 (CC).

<sup>103</sup> The Independent Electoral Commission ("the IEC") is the body created by ss 181(1)(f), 190 and 191 of the Constitution and further governed by the Electoral Commission Act 51 of 1996 for the purpose of running elections.

<sup>104</sup> *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) at par 4.

make every effort to settle it before a court is approached.”<sup>105</sup> The first question the court had to decide was whether the IEC was subject to this provision, which applies only to “organs of state involved in intergovernmental disputes.”<sup>106</sup> The court had no difficulty in finding that the IEC was indeed an organ of state in terms of section 239 of the Constitution.<sup>107</sup> This finding was based solely on the fact that the IEC “exercises public powers and performs public functions in terms of the Constitution.”<sup>108</sup> Of critical importance for the current analysis is the court’s subsequent finding that the IEC was not part of government.<sup>109</sup> The court found that the IEC was in fact independent and outside of government and stated succinctly: “The Commission cannot be independent of the national government, yet be part of it.”<sup>110</sup> Following this judgement the control test can no longer be viewed as the primary method to establish whether a body is an organ of state. Government control over a body remains a relevant factor in the determination, but the primary focus must now be on the public function of the body at issue.<sup>111</sup>

---

<sup>105</sup> *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) at par 17.

<sup>106</sup> Constitution s 41(3).

<sup>107</sup> *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) at par 22.

<sup>108</sup> *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) at par 22.

<sup>109</sup> *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) at par 27.

<sup>110</sup> *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) at par 29 – 31.

<sup>111</sup> See also *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another* 2006 1 SA 1 (SCA) at par 20; *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 4 BCLR 473 (SCA) at par 8; *Mittalsteel South Africa Ltd (formerly Iscor Ltd) v Hlatshwayo* 2007 1 SA 66 (SCA) at par 22. However, in his recent judgement in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 1 SA 343 (CC) at par 42 – 45 Yacoob J seemingly reintroduced much of the control test to the analysis under the guise of “public function” as the determining factor. While rejecting an institutional approach to the determination of what constitutes an organ of state, the judge found that the “extent of the control exercised by the Minister over the functioning of the [Micro Finance Regulatory] Council also shows that the function is public rather than private.”

The relevance of the identity of an actor in classifying specific action as subject to private or public regulation seems to lie in the impact such identity has at the outset of the classification on the manner in which the classification is done. If the actor is found to be an organ of state, there seems to be an immediate presumption that the actions of such actor are subject to public regulation. However, if the actor is found not to be an organ of state, the presumption is that the action is privately regulated.<sup>112</sup> Wiechers captures this relevance of the identity of the actor when he states:

[D]ie “normale” verhouding waarin the staat en sy organe in hul optrede te staan kom, [is] ‘n gesagsverhouding ... Administratiefreg is dus geen uitsonderingsreg nie maar eerder die normale, noodsaaklike reg tov die staat, en meer bepaald tov die staatsadministrasie ... Uit bostaande moet dit dan volg dat as die staat in ‘n privaatregtelike verhouding te staan kom,

---

The judge’s reasoning seems to be that governmental control over the functions of the relevant body results in such functions being public in nature and that such body accordingly qualifies as an organ of state due to its public function. It seems that the control test is shifted from direct application to the nature of the body itself in determining whether that body is an organ of state, to the nature of the functions of the body, which, in turn, may typify the body as an organ of state. For similar reasoning see *Mittalsteel South Africa Ltd (formerly Iscor Ltd) v Hlatshwayo* 2007 1 SA 66 (SCA) at par 19: “The control test is useful in a situation when it is necessary to determine whether functions, which by their nature might as well be private functions, are performed under the control of the State and are thereby turned into public functions instead. This converts a body like a trading entity, normally a private body, into a public body for the time and to the extent that it carries out public functions.”

<sup>112</sup> I am not suggesting that there are actual evidentiary presumptions at work here in the sense that once fact A (the identity of the actor) is proven, fact B (public or private regulation) will be presumed unless rebutted by the counterparty, as has been suggested in German law; see Booysen (1984) 9 *SAYIL* 56 at 81. I am merely suggesting that once the identity of the actor has been established as either public or private the application of public or private regulation will be readily accepted. The identity of the actor also has a significant impact on the anterior and related inquiry in cases with an international element. In establishing the applicable legal system (as opposed and anterior to establishing the specific rules of that system that apply, ie public or private law rules) through private international law methods, it is generally accepted that the proper law of the transaction is to a large extent determined by the sovereign identity of the particular state actor in the absence of a clear choice of law by the parties to the transaction, Mann (1975) 11 *Revue Belge de Droit International* 562 at 564.

dit 'n uitsonderingsverhouding is ... die privaatreë se gelding toewerheidsaktiwiteite [is] uitsonderlik.<sup>113</sup>

### 3.2 Criterion 2: Source of the power exercised

With the realisation that the identity of an actor is not dispositive in applying public or private law regulation to a specific action, the source of the power exercised in the given case became the most prominent criterion in the classification approach. If that power flowed from statute, then public regulation applied, but if it flowed from a private source, particularly contract, then only private regulation applied.<sup>114</sup>

#### 3.2.1 The key judgement: *Mustapha v Receiver, Lichtenburgh*

Perhaps the best illustration of the use of source as classification criterion is to be found in *Mustapha and Another v Receiver, Lichtenburgh and Others*.<sup>115</sup> In that case the applicants occupied Crown land for trading purposes.<sup>116</sup> The

---

<sup>113</sup> Wiechers *Administratiewet* 52 (The 'normal' relationship in which the state and its organs find themselves in their conduct is a relationship of authority or subordination ... Administrative law is consequently not exceptional law, but normal, indispensable law of the state, and more specifically, of state administration ... From the above it must follow that when the state acts in a private law relationship, that relationship must be an exceptional one ... the application of private law to state administration is exceptional (my translation)).

<sup>114</sup> In this regard South African law was closely aligned to the traditional view of the scope of judicial review in English law; see Hunt in Taggart (ed) *The Province of Administrative Law* 27: "For most of [the 20<sup>th</sup>] century the approach of English courts to delimiting the province of public law faithfully reflected the premises on which Diceyan constitutionalism was founded. Whether a particular decision or activity was subject to the High Court's supervisory jurisdiction depended entirely on the source of the power being exercised. If it was statutory, judicial review was available, but if its source lay in private law, such as contract, administrative law remedies were excluded by the availability of private law remedies." However, at least since the judgement in *R v East Berkshire Health Authority Ex p Walsh* [1985] QB 152, something more than simply a statutory source for the particular decision has been required before public law regulation would be applied by means of judicial review: Bailey 2007 *Public Law* 444.

<sup>115</sup> 1958 3 SA 343 (A).

<sup>116</sup> *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 351.



land was reserved for “natives” and controlled by the South African Native Trust in terms of the Development Trust and Land Act.<sup>117</sup> Since the applicants were non-native Indians, they were not permitted to use the land save by special “permission” granted by the Minister of Native Affairs as representative of the Trustee in terms of the Act.<sup>118</sup> The applicants were granted such permission in 1941.<sup>119</sup> The “Permission to Occupy” was recorded in a written document, the terms of which were exactly as set out in a schedule to the regulations empowering the Trustee to grant such permission.<sup>120</sup> The terms included the rental payable by the applicants in consideration of the occupation as well as the power to cancel the permission “upon three months’ notice given at any time by the Trustee.”<sup>121</sup> In 1954 the Trustee terminated the permission to occupy with the required three months’ notice.<sup>122</sup> In court the respondents admitted “that, while not the sole reason, the primary reason - the motivating cause - for the termination of appellants’ right of occupation by third respondent was that appellants are Indians.”<sup>123</sup>

The applicants challenged the termination of their right to occupy *inter alia* on the ground that it constituted discrimination on racial grounds, which was not authorised by the empowering provision and hence bad in law.<sup>124</sup> Central to this argument was the contention that the termination of the right to occupy amounted to the exercise of a statutory power, which was subject to

---

<sup>117</sup> Act 18 of 1936; *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 355.

<sup>118</sup> S 18(4); *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 355 – 356.

<sup>119</sup> *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 351.

<sup>120</sup> *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 356.

<sup>121</sup> *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 351.

<sup>122</sup> *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 352.

<sup>123</sup> *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 353.

<sup>124</sup> *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 354: “[T]he termination constituted partial and unequal treatment to a substantial degree between different sections of the community; that such discrimination was not authorised by the Act or regulations made thereunder; and that, consequently, the termination was bad in law on the principles laid down by this Court in *R v Abdurahman*, 1950 (3) SA 136 (AD), and *Tayob v Ermelo Local Road Transportation Board and Another*, 1951 (4) SA 440 (AD).”

the non-discrimination rule in *R v Abdurahman*.<sup>125</sup> The majority of the court rejected this argument and held that the relationship between the parties was a contractual one and that the Trustee exercised a contractual power when terminating the right to occupy with the result that the reason or motive for such action was irrelevant.<sup>126</sup> The majority argued:

Once such a permission (hereafter, for convenience called a permit) is granted ... and is accepted by the grantee, the mutual rights and obligations of the grantee and Trustee respectively are as set out in the terms of that permit: the legal relationship between the parties - the Trustee and the grantee of the permit - are governed by that document. The legal relationship thus created appears to me to be, in its essentials, a contractual relationship having its origin in offer and acceptance ... A contract is thus, in my view, concluded, at latest when the grantee expressly or impliedly accepts the permit ... It is that contract, not the Statute, which defines the respective rights of the Trustee and the grantee; and it is with reference to what is set out in that contract (the permit) that the right of the parties must be determined.<sup>127</sup>

The majority accordingly held that the non-discrimination rule of *R v Abdurahman*<sup>128</sup> did not apply in the present case.<sup>129</sup>

---

<sup>125</sup> 1950 (3) SA 136 (AD); *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 356.

<sup>126</sup> *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 357.

<sup>127</sup> *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 356.

<sup>128</sup> 1950 (3) SA 136 (AD).

<sup>129</sup> *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 356 – 357: “I am not aware of any authority which has applied the rule of *Rex v Abdurahman* to the field of contract, and in all the circumstances there is, in my judgment, no sufficient warrant for holding in the present case that the Trustee's *prima facie* unqualified and unrestricted right to terminate must be cut down by the 'no discrimination' principle as laid down in *Abdurahman's* and *Lusu's* cases, *supra*. In my judgment, that principle, which applies to the exercise of statutory powers, has no application to, and should not be extended to cover, the circumstances of the present case.”

In a dissenting judgement Schreiner JA rejected the majority's approach and in a key passage stated:

Although a permit granted under [the] ... Act ... has a contractual aspect, the powers ... must be exercised within the framework of the Act and the regulations which are themselves, of course, controlled by the Act. The powers of fixing the terms of the permit and of acting under those terms are all statutory powers. In exercising the power to grant or renew, or to refuse to grant or renew, the permit, the Minister acts as a state official and not as a private owner, who need listen to no representations and is entitled to act as arbitrarily as he pleases, so long as he breaks no contract. For no reason or the worst of reasons the private owner can exclude whom he wills from his property and eject anyone to whom he has given merely precarious permission to be there. But the Minister has no such free hand. He receives his powers directly or indirectly from the Statute alone and can only act within its limitations, express or implied. If the exercise of his powers under the sub-section is challenged the Courts must interpret the provision, including its implications and any lawfully made regulations, in order to decide whether the powers have been duly exercised...<sup>130</sup>

In a critically important concluding paragraph Schreiner JA stated:

[W]here an agreement is made in terms of powers granted to a public officer, and further powers are to be exercised by that officer in carrying out the agreement or in putting an end to it, the powers must be exercised subject to the express and implied limitations of the Statute.<sup>131</sup>

The approach of the majority in the *Mustapha* case has had a significant impact on the classification approach in South African law and in particular on establishing the source of the power as the most important criterion in this

---

<sup>130</sup> *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 347.

<sup>131</sup> *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 350.

approach.<sup>132</sup> A finding that the power exercised in a given case derives from a contractual source inevitably leads to the result that private law regulation applies to the exclusion of public law regulation.<sup>133</sup> Conversely, a ruling that the power derives from a statutory source triggers public law regulation.<sup>134</sup>

---

<sup>132</sup> See eg *Minister of Home Affairs v American Ninja IV Partnership* 1993 1 SA 257 (A); *Hare's Brickfields Ltd v Cape Town City Council* 1985 1 SA 769 (C); *Transvaalse Raad vir die Ontwikkeling van Buite-Stedelike Gebiede v Steyn Uitzicht Beleggings (Edms) Bpk* 1977 3 SA 351 (T); *De Vroeg en 'n Ander v Stadsraad van Randburg* 1970 2 SA 132 (T) where specific reference was made to the approach in *Mustapha*.

<sup>133</sup> See eg *Sibanyoni v University of Fort Hare* 1985 1 SA 19 (CkS) at 30: "The respondent relied solely on its contractual rights arising from its contract with each student...The rules of natural justice, on the basis of *audi alteram partem*, have no application in matters of contract"; *Mkhize v Rector, University of Zululand* 1986 1 SA 901 (D) at 904: "The decision of a person not to accept an offer to enter into a contract with another is ordinarily not a reviewable decision and not one which has to be arrived at after application of the rules of natural justice"; *Scholtz v Cape Divisional Council* 1987 1 SA 68 (C) at 74: "In short, appellant's rights are derived purely from contract, not from any statute. In the contract there is no tacit term varying - indeed in conflict with - the express wording of clause 1 of the lease. Nor is there any obligation, unexpressed in the contract but imposed by law, on the respondent to follow any particular guidelines at all in selecting, among those who qualify, ones to install or keep in leased premises"; *Naran v Head of Department of Local Government, Housing and Agriculture (House of Delegates)* 1993 1 SA 405 (T) at 407: "In my view, it is apparent that the *audi alteram partem* principle is only applicable in cases where a public body exercises a statutory right. The *audi alteram partem* principle is not applicable in the exercise of purely contractual rights".

<sup>134</sup> See eg *Myburgh v Danielskuil Munisipaliteit* 1985 3 SA 335 (NK) at 342: "Die respondent se dissiplinêre optrede teen die applikante het dus geskied uit hoofde van die bepalings van die ordonnansie ... en nie uit hoofde van die bepalings van die dienskontrak nie. Aangesien die besluit om haar dienste te beëindig gegrond was op die bepalings vervat in ... die ordonnansie, het die respondent ... in 'n administratiewe hoedanigheid teenoor die applikante opgetree" (The respondent's disciplinary action against the applicant was taken in terms of the provisions of the ordinance ... and not in terms of the provisions of the contract of employment. Since the decision to terminate her services was based on the provisions contained in ... the ordinance, the respondent acted in an administrative capacity vis-à-vis the applicant (my translation)); *Mokopanele en Andere v Administrateur, Oranje Vrystaat, en Andere* 1989 1 SA 434 (O) (at 440: "Dit is verder ook duidelik dat die applikante se diensbetrekking ... beheer was slegs deur die bepalings van die Wet en die kode...Dit blyk dan ook duidelik...dat daar teen die applikante opgetree is nie uit hoofde van 'n kontrak nie maar uit hoofde van die bepalings van ... die kode. Die onderhawige is dus nie 'n geval van

The majority ruling in the *Mustapha* case can be criticised on various grounds.<sup>135</sup> Chief among these is that “the court’s very reading of the relationship as contractual seems so artificial.”<sup>136</sup> As Cora Hoexter eloquently argues, the majority’s construal of the interaction between the parties as consensual simply does not conform to reality.<sup>137</sup> This is underscored by the fact that the terms of the “contract” between the parties were dictated in the empowering provisions.<sup>138</sup> The averred choice the majority found when it said that the applicant’s “liability to notice derives, not from some statutory provision willy-nilly forced upon him, but from his voluntary consent”<sup>139</sup> is mere illusion and serves to deny the underlying disparity of power. The argument that the applicants had a choice in occupying this specific piece of Crown land with the result that their relationship with the state was voluntary, is equally unconvincing if one keeps in mind that the applicants were established tenants on the land when it was acquired by the Trust subject to the provisions of the Development Trust and Land Act<sup>140</sup> in 1939.<sup>141</sup> The choice

---

bloot 'n heer en dienaar verhouding nie” (It is furthermore clear that the applicants’ employment were governed only by the provisions of the Act and the code ... It thus also seems clear that the action taken against the applicants was based on the code and not on any contract. This is thus not a case of a simple master and servant relationship (my translation)); *Sedgefield Ratepayers’ and Voters’ Association and Others v Government of the Republic of South Africa and Others* 1989 2 SA 685 (C) at 703: “The grant does not owe its existence to any agreement between the Government and the Council. It was born not of agreement but of an exercise by the Government of a statutory power. The conditions were therefore not in my view contractually imposed, as respondents contend they were... In the result, therefore, I am of the view that the [action] by the State President...and...the Minister of Community Development ...were ultra vires and of no force and effect”; *Opperman v Uitvoerende Komitee van die Verteenwoordigende Owerheid van die Blankes en Andere* 1991 1 SA 372 (SWA) at 379.

<sup>135</sup> For criticism of the judgement see Kahn 1958 ASSAL 1 at 23; Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* 141; Hoexter (2004) 121 SALJ 595 at 601 – 602.

<sup>136</sup> Hoexter (2004) 121 SALJ 595 at 601.

<sup>137</sup> Hoexter (2004) 121 SALJ 595 at 601 – 602.

<sup>138</sup> *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 356.

<sup>139</sup> *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 357.

<sup>140</sup> Act 18 of 1936.

the applicants therefore had when they “accepted” the state’s “offer” contained in the “Right to occupy”, was between submitting to the new statutorily applied terms or terminating their existing business. The mismatch between the judgement and reality is best illustrated in the following conclusion of the majority:

The legal *nexus* between the Trustee and the grantee of the permit derives, not from the provisions of the Statute, but from the offer and acceptance which culminated in the accepted permit. The right of the Trustee to terminate on notice is one of the terms of that *nexus* ...<sup>142</sup>

It is exactly this disconnect between the judgement and reality<sup>143</sup> as well as the denial of the underlying power disparity that has (only) recently led the Supreme Court of Appeal in *Logbro Properties CC v Bedderson NO*<sup>144</sup> to overrule the majority judgement in *Mustapha* and accept Schreiner JA’s dissenting judgement as correct.

Before I move on to further examples of source as primary criterion in the classification of specific action, one aspect of Schreiner JA’s minority judgement in *Mustapha* needs mention. In the passage from the minority judgement quoted above, Schreiner JA referred to the state’s powers as flowing “directly or indirectly from the Statute.”<sup>145</sup> The concept of powers flowing “indirectly” from statutory source is important to note. This same idea is made clear in the second passage from the dissenting judgement quoted above. There the judge stated that, where an agreement is *made* in terms of statutory powers, any “further powers” exercised in *implementation* (including

---

<sup>141</sup> *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 351.

<sup>142</sup> *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 357.

<sup>143</sup> In criticising source as a criterion to distinguish between public and private power of the state, Alder (1993) 13 *Legal Studies* 183 at 193 – 194 states: “The notion of consensual submission is unreal in the context of monopoly.” He goes on to argue that it is exactly this unreality of the source approach that has forced courts in England to look to other criteria to classify (state) action such as the functional approach followed in *R v Panel on Take-overs and Mergers, ex parte Datafin Plc* [1987] QB 815.

<sup>144</sup> 2003 2 SA 460 (SCA) at par 12 – 13.

<sup>145</sup> *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 347.

termination) of the contract are also subject to statutory regulation.<sup>146</sup> The important point, to which I shall return below, is that the original source of the power to enter into the contract also has a determinative impact on any further powers flowing from or created by an exercise of that original power. Simply put, this means that, once the origin of a contract can be traced to a statutory source, action taken in terms of that contract cannot be divorced from the statutory source and will, like the conclusion of the agreement, be subject to public law regulation due to the public source of the power thus exercised.

### **3.2.2 Reliance on source in university cases**

An area where the source of the power has played an important role in subjecting the action at stake to public or private law regulation is that of university-student relationships. In some of these cases the analysis of the relationship between the parties as contractual seems just as incredible as the majority's finding in *Mustapha*. In *Mkhize v Rector, University of Zululand*<sup>147</sup> Booysen J analysed that relationship as follows:

It seems to me that the relationship between a student and the University is a contractual one ... and that it is a contract in respect of each academic year. It is entered into by acceptance of the student's application for admission; be it a first or a subsequent admission. It seems to follow that, in the absence of an implied term binding the University to acceptance in years subsequent to the first year, the University would be free to accept or refuse the offer contained in the application for re-admission ... The decision of a person not to accept an offer to enter into a contract with another is ordinarily not a reviewable decision and not one which has to be arrived at after application of the rules of natural justice.

The suggestion that the student is making an offer to the university, which is then accepted by the latter to create a contractual relationship, seems at odds

---

<sup>146</sup> *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 350.

<sup>147</sup> 1986 1 SA 901 (D) at 904.

with experience in the real world. However, despite the seemingly fantastic quality of the above account, the characterisation of the university-student relationship as contractual is now well-entrenched in South African law.<sup>148</sup> It is not, however, the characterisation of the relationship as contractual as such that is objectionable, but the effect of such characterisation. The approach becomes problematic when that characterisation is used to identify the contract as the source of the power exercised in the given case, which contractual source in turn is used as primary criterion in classifying the action at stake as subject to exclusive private law regulation. Simply put, the objection arises when the contract is used as sole criterion in the classification approach.<sup>149</sup> Fortunately, the hold of contract as sole criterion in such cases has more recently yielded to other criteria influencing the classification of the action under scrutiny. In *Lunt v University of Cape Town*<sup>150</sup> Howie J expressly rejected the “purely contractual”<sup>151</sup> approach and said:

In my opinion the very understandable and indeed natural appeal to feelings of fairness ... does find recognition and

---

<sup>148</sup> *Schoeman v Fourie* 1941 AD 125; *Jacob and Another v Council of University of Durban-Westville and Another* 1974 3 SA 552 (A); *Sibanyoni v University of Fort Hare* 1985 1 SA 19 (CkS); *Lunt v University of Cape Town* 1989 2 SA 438 (C); *Tyatya v University of Bophuthatswana* 1994 2 SA 375 (BG); *Mokgoko and Others v Acting Rector, Setlogelo Technikon, and Others* 1994 4 SA 104 (BG); *Zwelibanzi v University of Transkei* 1995 1 SA 407 (Tk); Dlamini *The Administrative Law of a Typical South African University* 400.

<sup>149</sup> In *Sibanyoni v University of Fort Hare* 1985 1 SA 19 (CkS) this is encapsulated in the court’s statement at 30 – 31: “The respondent relied solely on its contractual rights arising from its contract with each student ... The rules of natural justice, on the basis of *audi alteram partem*, have no application in matters of contract; contractual rights and obligations are governed by the laws of contract as they are known to us. Whether the appellants, or any of them, through pangs of conscience or for any other reason, consider the adverse results of respondent’s exercise of its contractual rights to be ‘disciplinary’ or punitive is a matter of no concern to the Court in assessing the validity or enforceability of the actions or rights of the parties to the contract.”

<sup>150</sup> 1989 2 SA 438 (C) at 449.

<sup>151</sup> In the words of Beck CJ in *Zwelibanzi v University of Transkei* 1995 1 SA 407 (Tk) at 411.



effective practical expression in the application of the legitimate expectation approach even in a contractual context.<sup>152</sup>

In these cases the relationship between university and student is still viewed as one of contract, but that fact is not dispositive in applying public or private regulation to the action at stake.

### 3.2.3 The decline of source as criterion

The turning of the tide in South African law against source as sole criterion in the classification of state action is epitomized by the judgement in *Administrator, Transvaal and Others v Zenzile and Others*.<sup>153</sup> In this case the respondents were employed at the Natalspruit Hospital by the Transvaal provincial administration.<sup>154</sup> Because of their participation in a work stoppage the respondents were all summarily dismissed by the administration.<sup>155</sup> The High Court, however, set aside the dismissal upon application by the respondents on the ground of procedural impropriety and in particular the failure by the administration to adhere to the principles of *audi alteram partem*.<sup>156</sup> Upon appeal, the administration argued that

the contractual relationship between the Administration and the respondents was simply one of master and servant governed exclusively by the common law of contract; and that the respondents' participation in the work-stoppage amounted to an unlawful repudiation of their contractual obligation to work, or at

---

<sup>152</sup> See also *Zwelibanzi v University of Transkei* 1995 1 SA 407 (Tk) at 411 where a similar approach was followed.

<sup>153</sup> 1991 1 SA 21 (A).

<sup>154</sup> *Administrator, Transvaal and Others v Zenzile and Others* 1991 1 SA 21 (A) at 25.

<sup>155</sup> *Administrator, Transvaal and Others v Zenzile and Others* 1991 1 SA 21 (A) at 27 – 28.

<sup>156</sup> *Administrator, Transvaal and Others v Zenzile and Others* 1991 1 SA 21 (A) at 28. The *audi alteram partem* principle is one leg of the rules of natural justice that literally means “hear the other side” and in essence affords a party affected by a decision a hearing, mostly prior to the decision, on timely notice and with adequate information in order for such affected party to fairly present her case; Baxter *Administrative Law* 536 – 557; Hoexter *The New Constitutional and Administrative Law Volume II Administrative Law* 195 – 204; Wade & Forsyth *Administrative Law* chapter 14.

any rate to a fundamental breach of that obligation, which entitled their employer summarily to dismiss them. In these circumstances, so it was said, the decision to dismiss fell entirely beyond the purview of administrative law, and the rules of natural justice did not come into the case at all.<sup>157</sup>

Hoexter JA rejected this argument outright.<sup>158</sup> He disagreed with the applicants' portrayal of the matter as one of "pure contract" and hence subject only to private law regulation and pointed to the statutory basis of the employment.<sup>159</sup> However, Hoexter JA did not restrict himself to the source of the power exercised in concluding that public law regulation applied to the dismissal. In fact, the source of the power exercised is relegated to lesser importance in comparison with the other factors identified by the judge in his classification. This is clear where Hoexter JA set out the test to be applied in the current instance:

In my view it is logically unsound and wrong in principle to postulate that the *audi* principle has no application to 'purely contractual relations'; from that premise to embark upon an inquiry as to whether or not there is something in the legislation which imports the *audi* principles into the contractual relationship; and to require that the statute concerned should incorporate the *audi* principle, either expressly or implicitly. It seems to me that so to approach the problem is to put the cart before the horse. The existence of a contractual relationship cannot alter the essential nature of the inquiry. With reference to any particular provision of a statute (in this case the Code), the questions to be answered are, as always: (i) is a public official empowered to give a decision affecting the existing rights of an individual? And, if so, (ii) is the right of the individual to be heard

---

<sup>157</sup> *Administrator, Transvaal and Others v Zenzile and Others* 1991 1 SA 21 (A) at 33 – 34.

<sup>158</sup> *Administrator, Transvaal and Others v Zenzile and Others* 1991 1 SA 21 (A) at 34.

<sup>159</sup> *Administrator, Transvaal and Others v Zenzile and Others* 1991 1 SA 21 (A) at 34: "The element of public service injected by statute necessarily entails, so I consider, that the respondents were entitled to the benefit of the application of the principles of natural justice before they could be summarily dismissed for misconduct."

before the decision is taken excluded either expressly or impliedly?<sup>160</sup>

From this passage it is clear that the consequences of the action play a central role in activating public law regulation. Further on in the judgement Hoexter JA noted another important factor when he stated:

The fact that by the law of contract an indisputable right may have accrued to an employer to dismiss his employee does not, for the purposes of administrative law, mean that the requirements of natural justice can have no application in relation to the actual exercise of such right. And when, as here, the exercise of the right to dismiss is disciplinary, the requirements of natural justice are clamant.<sup>161</sup>

Again, the source of the power exercised was overshadowed by another factor, viz the disciplinary nature of the power exercised. It was not only the disciplinary character of the power exercised that influenced Hoexter JA's classification, but also the public nature thereof.<sup>162</sup> The overall picture emerging from *Zenzile* is of an approach where a number of criteria, when viewed together, result in the action being classified as subject to public law regulation. Of these criteria, the source of the power exercised is one relevant factor,<sup>163</sup> but it cannot be dispositive on its own.

---

<sup>160</sup> *Administrator, Transvaal and Others v Zenzile and Others* 1991 1 SA 21 (A) at 35 – 36.

<sup>161</sup> *Administrator, Transvaal and Others v Zenzile and Others* 1991 1 SA 21 (A) at 36.

<sup>162</sup> *Administrator, Transvaal and Others v Zenzile and Others* 1991 1 SA 21 (A) at 34: "Here the employer and decisionmaker is a public authority whose decision to dismiss involved the exercise of a public power."

<sup>163</sup> It is clear from a number of passages in Hoexter JA's judgement that the statutory source of the power exercised remains important. See *Administrator, Transvaal and Others v Zenzile and Others* 1991 1 SA 21 (A) at 34: "The element of public service *injected by statute* necessarily entails, so I consider, that the respondents were entitled to the benefit of the application of the principles of natural justice" (my emphasis) and "In consequence every condition or term of employment prescribed in the Code as governing any contract of service between the Administration and ... employee is statutorily injected into the contractual relationship between the parties," and at 35: "When a statute empowers a public body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the individual has a right to be heard" and "It seems to me that *ex hypothesi* a contract of service

### 3.2.4 Current relevance of source as criterion

Source remains an important factor in classifying state action. This is evident from the recent judgement of the Supreme Court of Appeal in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC*.<sup>164</sup> The Cape Metropolitan Council awarded a tender to the respondent in 1997 for the registration of regional services and regional establishment levy ratepayers and the collection of arrear levies in a certain area on behalf of the Council.<sup>165</sup> The Council acted in terms of the Local Government Transition Act,<sup>166</sup> which empowers a metropolitan council, like the Council, to outsource its powers to private parties upon such conditions as the parties may agree upon.<sup>167</sup> The respondent earned commission on arrear levies collected and also for every ratepayer registered.<sup>168</sup> Towards the end of 1998 a competitor of the respondent, which held a similar contract for another area under the Council's control, made allegations about fraudulent claims by the respondent amounting to R1.4 million.<sup>169</sup> The Council launched a full investigation into these claims and, after initial enquiries substantiated the allegations, the Council summarily terminated the contract with the respondent.<sup>170</sup> The respondent subsequently successfully applied to the Cape High Court for an

---

which is governed in part by statutory provisions cannot properly be described as a 'pure' or 'ordinary' contract of master and servant; an officer or employee under such a contract cannot appropriately be called an 'ordinary' servant; and the rights and obligations of the parties cannot legitimately be said to arise out of 'purely contractual relations'."

<sup>164</sup> 2001 3 SA 1013 (SCA).

<sup>165</sup> *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 3 SA 1013 (SCA) at par 4.

<sup>166</sup> Act 209 of 1993.

<sup>167</sup> *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 3 SA 1013 (SCA) at par 4.

<sup>168</sup> *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 3 SA 1013 (SCA) at par 5.

<sup>169</sup> *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 3 SA 1013 (SCA) at par 6.

<sup>170</sup> *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 3 SA 1013 (SCA) at par 6 – 8.

order setting aside the termination of its contract due to a failure of procedural fairness.<sup>171</sup> On appeal, the Council argued that the termination of the contract did not amount to administrative action, but was a matter of pure contract with the result that the administrative law rules of procedural fairness did not apply.<sup>172</sup> The Supreme Court of Appeal agreed with this contention.<sup>173</sup> Streicher JA referred to a number of factors in classifying the action as subject to public law regulation or not. He briefly argued that the action was not in the implementation of government policy<sup>174</sup> and then, in reliance on *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*<sup>175</sup> simply listed a number of relevant factors, viz “the nature of the power being exercised,” “the source of the power, the subject-matter, whether it involves the exercise of a public duty and how closely related it is to the implementation of legislation.”<sup>176</sup> However, despite the seemingly multifaceted approach to classification endorsed by the judge, it emerges from the following paragraph that the source of the power exercised was paramount in reaching the conclusion that public law rules of procedural fairness did not apply to the cancellation of the contract:

The appellant is a public authority and, although it derived its power to enter into the contract with the first respondent from statute, it derived its power to cancel the contract from the terms of the contract and the common law ... When it purported to cancel the contract it was not performing a public duty or implementing legislation; it was purporting to exercise a

---

<sup>171</sup> *Metro Inspection Services (Western Cape) CC and Others v Cape Metropolitan Council* 1999 4 SA 1184 (C).

<sup>172</sup> *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 3 SA 1013 (SCA) at par 9.

<sup>173</sup> *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 3 SA 1013 (SCA) at par 22.

<sup>174</sup> This is done primarily to distinguish it from the case of *Ramburan v Minister of Housing (House of Delegates) and Others* 1995 1 SA 353 (D), where a cancellation of a contract was found to be subject to public law regulation.

<sup>175</sup> 2000 1 SA 1 (CC).

<sup>176</sup> *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 3 SA 1013 (SCA) at par 17.

contractual right founded on the consensus of the parties in respect of a commercial contract.<sup>177</sup>

The primacy of source as classification criterion is perhaps best illustrated in the following paragraph, where the judge pointed to the Council's statutory power to terminate the contract and said:

In my view, there can be no question that, had the appellant purported to cancel the contract in terms of the provisions of reg 22(1), it would have been exercising a public power which would have constituted 'administrative action' in respect of which a fair procedure in terms of s 33 of the Constitution would have required compliance with the *audi* rule ... However, the appellant did not purport to cancel the contract on any of the grounds referred to in reg 22. It purported to cancel the contract, not on the ground of being satisfied of the existence of any of the circumstances referred to in reg 22, but on the ground that substantial fraudulent claims had actually been submitted and that such fraudulent claims constituted a material breach of contract entitling the appellant to cancel in terms of the law of contract.<sup>178</sup>

From this passage it seems that it was the Council's reliance on the private source of the power it exercised, the contract, rather than on the (available) public source, the Financial Regulations for Regional Services Councils,<sup>179</sup> that resulted in the court's classification. It is a clear example of source being regarded as the determinative factor.<sup>180</sup>

---

<sup>177</sup> *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC 2001 3 SA 1013 (SCA) at par 18.

<sup>178</sup> *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC 2001 3 SA 1013 (SCA) at par 20.

<sup>179</sup> R1524 GG 13330, 28 June 1991.

<sup>180</sup> However, as Cora Hoexter indicates there is "a considerable saving grace" in the judgement in the form of the judge's remarks regarding the respective bargaining power of the parties to the contract and the absence of superior power on the side of the Council, which "lies behind" the court's reliance on source as classification criterion: Hoexter (2004) 121 SALJ 595 at 611. Although I agree that, on its own, these remarks of the judge point to a new

The prominence of source in this judgement has subsequently been greatly reduced by the judgement in *Logbro Properties CC v Bedderson NO*.<sup>181</sup> In the latter case Cameron JA highlighted the role of the respective bargaining power of the parties in the *Cape Metropolitan Council* case in the classification of the action at stake and stated:

The case is thus not authority for the general proposition that a public authority empowered by statute to contract may exercise its contractual rights without regard to public duties of fairness. On the contrary: the case establishes the proposition that a public authority's invocation of a power of cancellation in a contract concluded on equal terms with a major commercial undertaking, without any element of superiority or authority deriving from its public position, does not amount to an exercise of public power.<sup>182</sup>

Source also remains a relevant criterion in classifying state action under PAJA. The relevant parts of the definitions in section 1 of that Act read as follows:

- (i) **“administrative action”** means any decision taken, or any failure to take a decision, by—
  - (a) an organ of state, when—

---

direction regarding classification criteria, I do not think that the judgement as a whole breaks with the source-based approach. On the contrary, I think it reinforces the focus on source. Hoexter does acknowledge that her impression “is not particularly supported by the second half of the passage” in which the “saving grace” remarks appear: Hoexter (2004) 121 *SALJ* 595 at 612. Daniel Malan Pretorius has also rightly pointed out that the subject matter of the contract at stake in this case, viz the outsourcing of public and statutory functions, and the resultant statutory objective it pursued, were reason enough to classify the action under scrutiny as subject to public law rules: Pretorius (2002) 119 *SALJ* 374 at 389 – 390. For similar reasoning where source played a critical role in ruling that contractual action did not amount to administrative action, see Mthiyana JA’s judgement in *Transnet Ltd and Others v Chirwa* 2007 2 SA 198 (SCA).

<sup>181</sup> 2003 2 SA 460 (SCA).

<sup>182</sup> *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) at par 10 (footnotes omitted). For a detailed discussion of this important judgement, see par 3.3.1 below.

- (i) exercising a power in terms of the Constitution or a provincial constitution; or
- (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision; ...
- (vi) **“empowering provision”** means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken.

Although “empowering provision” has an extremely wide definition in PAJA, which would render source as classification criterion under the Act mostly ineffective, there is one anomaly which makes source still a relevant criterion under PAJA. Looking at the above definitions, it would seem that actions by organs of state taken in terms of contracts (or any other non-statutory source) do not qualify as administrative action under the Act despite the wide definition of “empowering provision”, because decisions by organs of state will only amount to administrative action under the above definitions where such decisions are taken in terms of either a constitution or any legislation.<sup>183</sup> Plasket puts forward a construction that partially solves this dilemma.<sup>184</sup> He argues that where “governmental functionaries” act in terms of non-statutory sources, such action may still qualify as administrative action in terms of section 1(i)(b) of PAJA, because such a functionary will be a “natural or juristic person, other than an organ of state” acting in terms of an “empowering provision” like a contract. However, this solution does not solve all problems. Where a department of state is a party to a contract and acts in terms of such contract, it is difficult to see how such action will fall within the definition of

---

<sup>183</sup> See the judgement of Mthiyana JA in *Transnet Ltd and Others v Chirwa* 2007 2 SA 198 (SCA) where the absence of a statutory source of the power exercised by the relevant organ of state played a critical role in the judge’s finding that the action did not amount to administrative action.

<sup>184</sup> Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* 113 – 114.



administrative action in PAJA if the action under scrutiny cannot be related to a statutory source. The department of state in such a case will clearly be an organ of state in terms of the definition in section 239 of the Constitution. Recourse to section 1(i)(b) of PAJA will accordingly not be possible. Leaving all other factors aside, source will thus be an important factor in such a case.<sup>185</sup>

The continued relevance of source as classification criterion is perhaps best viewed in similar terms as that of identity of the actor.<sup>186</sup> In *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and*

---

<sup>185</sup> Cora Hoexter states with reference to the reasoning in *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC 2001 3 SA 1013 (SCA) that exclusive reliance on a common law source in contrast to a statutory source will not assist public bodies in evading administrative law rules under PAJA because of the wide definition of “empowering provision” in that Act: Hoexter (2004) 121 SALJ 595 at 611 note 106. However, it is difficult to see how the wide definition of “empowering provision” will be of any assistance in a case such as *Cape Metropolitan Council* decided under PAJA. The Cape Metropolitan Council will clearly qualify as an organ of state in terms of s 239 of the Constitution (“any ... administration in the ... local sphere of government”) with the result that its actions must be measured against s 1(i)(a) of PAJA in order to establish if the Act applies. If one accepts the court’s ruling in *Cape Metropolitan Council* that the termination was based exclusively on contract, ie not on a statutory source, then that action will not be subject to PAJA. Mthiyana JA’s judgement in *Transnet Ltd and Others v Chirwa* 2007 2 SA 198 (SCA) furthermore suggests that the respective references to legislation in s 239 of the Constitution and s 1(i) of PAJA may be interpreted at different levels of generality. The judge accepted that Transnet is an organ of state in terms of s 239 of the Constitution and by implication found it to be exercising a power/function in terms of either the Constitution or legislation (presumably the Legal Succession to the South African Transport Services Act 9 of 1989), but ruled that its action under scrutiny did not amount to administrative action under s 1(i) of PAJA since it was not based on legislation. It seems that the search for legislation under the former provision is much more general than under the latter provision. This approach exacerbates the problem outlined above, since more functionaries will consequently qualify as organs of state with the result that their actions must be tested against s 1(i)(a) of PAJA to qualify as administrative action so that the limitation on qualifying sources (ie constitutions or legislation) will extend to a larger group of administrators. On the problem of the level of generality at which the source analysis is aimed, see par 3.2.5 below.

<sup>186</sup> See note 112 and accompanying text above.

*Others*<sup>187</sup> Plasket J captured this role of source when he stated that “a statutory source of power is significant because ‘it places the existence of public power largely, if not completely, beyond contention.’” Plasket J also noted that this view is in line with the use of source in English law as put forward by Craig.<sup>188</sup> Craig states that if a “power is derived from statute then the body is presumptively public.”<sup>189</sup> A presumption seems to emerge here similar to the one suggested above in relation to the identity of the actor as classification criterion.<sup>190</sup> However, Craig cautions against this criterion by noting two “fundamental difficulties” with it. He argues, firstly, that it is too broad, and secondly and more importantly, that it fails to distinguish between different powers of public bodies.<sup>191</sup> While a public authority may owe some of its powers to statutory origin, not all of its powers are likewise statutorily based, especially where “public bodies operate in an ordinary commercial capacity.”<sup>192</sup> It should be noted that Craig’s analysis focuses on an institutional approach, where criteria are identified to classify bodies in contrast to the focus of the classification approach currently under discussion, which focuses on specific action.

### **3.2.5 Level of generality at which source is determined**

One final point to note regarding source as classification criterion revolves around the level of generality at which the source of the power is determined. As noted above, Schreiner JA made some reference to this issue in his minority judgement in *Mustapha and Another v Receiver, Lichtenburgh and*

---

<sup>187</sup> 2006 2 All SA 175 (E) at par 54 note 55, with reference to the undated and unreported judgement of Brassey AJ in an application for leave to appeal in *Chirwa v Transnet Ltd and Others* WLD (case no. 03/01052).

<sup>188</sup> Plasket J referred to Craig in Corder & Maluwa (eds) *Administrative Justice in Southern Africa* 25, an extended version of which is to be found in Taggart (ed) *The Province of Administrative Law* 196.

<sup>189</sup> Craig in Taggart (ed) *The Province of Administrative Law* 198.

<sup>190</sup> See note 112 and accompanying text above.

<sup>191</sup> Craig in Taggart (ed) *The Province of Administrative Law* 198.

<sup>192</sup> Craig in Taggart (ed) *The Province of Administrative Law* 198.

*Others*.<sup>193</sup> Schreiner JA referred to the power to terminate the contract, as provided for in the contract itself, as flowing “indirectly” from the statute which authorised the conclusion of the contract.<sup>194</sup> He viewed the contractual power to cancel the contract, along with all other powers created by the contract, as part and parcel of the exercise of the statutory power authorising the original conclusion of the contract in the first instance. A similar approach is found in a number of cases where powers conferred by the contract were held to be indirectly based on the statutory source that empowered the organ of state to conclude the contract.<sup>195</sup>

---

<sup>193</sup> 1958 3 SA 343 (A). See notes 145 to 146 and accompanying text above.

<sup>194</sup> *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 347.

<sup>195</sup> See *Potchefstroom se Stadsraad v Kotze* 1960 3 SA 616 (A) where Malan AJA in a dissenting opinion stated at 630: “The Council derives its power to enter into a lease of municipal property - with the implied power to cancel or to agree to a cancellation of any existing lease - specifically from sec. 79 (18) of the Ordinance”; *Ismail v Durban City Council* 1973 2 SA 362 (N) at 369 where Harcourt J stated: “the Ordinance, in express terms, gave power to let stalls which by necessary implication might include a contractual term for the termination of such tenancy”; *Opperman v Uitvoerende Komitee van die Verteenwoordigende Owerheid van die Blankes en Andere* 1991 1 SA 372 (SWA) at 379; *Metro Inspection Services (Western Cape) CC and Others v Cape Metropolitan Council* 1999 4 SA 1184 (C) at 1195: “since [the Council’s] authority to appoint the first applicant derives from a public power, it must, in my view, follow that its authority to terminate the agreement with the first applicant similarly derives from a public power”; *Independent Municipal and Allied Trade Union and Others v MEC: Environmental Affairs, Developmental Social Welfare and Health, Northern Cape Province, and Others* 1999 4 SA 267 (NC) at 286: “The performance of health services by first respondent is a statutory power and if the said agency agreement was concluded in terms of statutory power then it is an administrative action. Similarly was the termination of the said agency agreement also an administrative action”; *Masetlha v President of the Republic of South Africa and Another* 2007 JOL 19069 (T): “In summary, I was not referred to and I did not find any legislative provision that expressly provides for the dismissal of the DG of the [National Intelligence] Agency. Where, then, does the power to dismiss the DG of the Agency lie? I have earlier concluded that section 209(2) of the Constitution confers on the President the power to appoint the head (DG) of the Agency and that such appointment constitutes executive action under section 85(2)(e) of the Constitution ... Moreover, the power to appoint will, in the absence of any specific provision to the contrary, include the power to dismiss. Therefore, I conclude that the President’s power to dismiss the head of the Agency is necessarily implicit in section 209(2) of the Constitution”; *Transnet Ltd and Others v Chirwa* 2007 2 SA 198 (SCA) at par 52 (per Cameron JA for the minority): “Despite the allusion to

In contrast, in judgements such as *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC*<sup>196</sup> and *Naran v Head of Department of Local Government, Housing and Agriculture (House of Delegates)*<sup>197</sup> the search for the source of the power is much more specific.<sup>198</sup> In these cases the exercise of a power bestowed on a party by the contract has the contract itself as source and not any prior (and more general) power to create that contract. The power exercised is isolated and only the (immediate) source of that power is specifically relevant as classification criterion. Although these two approaches use the same classification criterion, viz source, they differ dramatically in outcome. This difference illustrates that source as a criterion in classifying state action is not a particularly stable approach and cannot be said to yield certain outcomes. It is clearly subject to manipulation.<sup>199</sup>

It is possible to take an even broader view of the source of the power than that of Schreiner JA in the *Mustapha* case. If this evident variability of pinning the relevant source down is taken to the extreme, the usefulness of

---

'the statute', it is in my view of no significance that the employee's contract of employment, or Transnet's authority to employ her, did not derive from a particular, discernible, statutory provision. Transnet is a public entity created by legislation and operating under statutory authority. It would not exist without statute. Its every act derives from its public, statutory character, including the dismissal at issue here." For similar arguments in English law, see *Jones v Swansea City Council* [1989] 3 All ER 162 at 174 (per Slade LJ): "The suggestion that the grant of an agreement for a lease by a council would constitute the exercise of a power having a 'statutory or public' origin while the exercise of a right reserved by that agreement to the lessor council would constitute the exercise of a power having a 'private' origin, in my view comes near to playing with words; the ultimate origin of each power is surely the statute," see also Nourse LJ's remarks at 186. Although the Court of Appeal's ruling was overturned on appeal to the House of Lords, these remarks of Slade LJ were confirmed in an *obiter dictum* of Lord Lowry in the House of Lords: *Jones v Swansea City Council* [1990] 3 All ER 737 at 740; Arrowsmith (1990) 106 LQR 277 at 287 – 289.

<sup>196</sup> 2001 3 SA 1013 (SCA).

<sup>197</sup> 1993 1 SA 405 (T) at 408.

<sup>198</sup> See also Mthiyana JA's judgement in *Transnet Ltd and Others v Chirwa* 2007 2 SA 198 (SCA) and *De Vroeg en 'n Ander v Stadsraad van Randburg* 1970 2 SA 132 (T) at 140.

<sup>199</sup> A good illustration of such manipulation is Mthiyana JA's divergent treatment of source under s 239 of the Constitution and s 1(i) of PAJA respectively in *Transnet Ltd and Others v Chirwa* 2007 2 SA 198 (SCA). See note 185 above.

source as a criterion in classifying state action is completely undermined. This is illustrated in the current context by the argument of Daniel Malan Pretorius that “all public bodies derive their authority to act from the Constitution.”<sup>200</sup> He argues that the current constitutional dispensation in South Africa dictates that all public bodies “ultimately” act in terms of the Constitution and that the source of all state action is hence public. He therefore concludes: “[T]he source of the power upon which reliance is placed in terminating a contract is not a helpful basis for enquiring into the applicability of the *audi* rule.”<sup>201</sup> This argument is supported by the statement of the Supreme Court of Appeal in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*<sup>202</sup> that “[t]he Constitution of the Republic of South Africa, 1996 ... is the repository of all State power.”<sup>203</sup>

---

<sup>200</sup> Pretorius (2002) 119 SALJ 374 at 384. In English law John Alder has taken a similar line of reasoning even further in arguing that “[a]ll legal power ultimately derives from ‘public law’ sources, so that, for example the enforcement of a contract by an individual could be regarded as an exercise of power delegated by the state.” (1993) 13 *Legal Studies* 183 at 188.

<sup>201</sup> Pretorius (2002) 119 SALJ 374 at 385.

<sup>202</sup> 2005 6 SA 313 (SCA) at par 20.

<sup>203</sup> In the context of state tendering the Constitutional Court generally stated in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 20 – 21 that “when a tender board procures goods and services on behalf of government it wields power derived first from the Constitution itself [in terms of section 217] and next from legislation in pursuit of constitutional goals ... [and thus] when a tender board evaluates and awards a tender, it acts within the domain of administrative law. Its decision in awarding or refusing a tender constitutes administrative action. That is so because the decision is taken by an organ of State which wields public power or performs a public function in terms of the Constitution or legislation and the decision materially and directly affects the legal interests or rights of tenderers concerned” (footnotes omitted). If one accepts Phoebe Bolton’s argument that s 217 of the Constitution covers all forms of state contracting and not only state acquisitions; Bolton *The Law of Government Procurement in South Africa* 3, 67 – 68, it follows from above statements by the Constitutional Court that the conclusion of all state contracts amounts to the exercise of constitutional power. See also *Transnet Ltd and Others v Chirwa* 2007 2 SA 198 (SCA) at par 52 (per Cameron JA for the minority): “Transnet is a public entity created by legislation and operating under statutory authority. It would not exist without statute. Its every act derives from its public, statutory character, including the dismissal at issue here ... That

Pretorius also develops a related argument in criticism of the narrow or specific approach to source such as that in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC*<sup>204</sup> and *Naran v Head of Department of Local Government, Housing and Agriculture (House of Delegates)*.<sup>205</sup> He argues that this approach does not adequately distinguish between *rights* and *powers*.<sup>206</sup> It is the source of the *power* exercised that is relevant as classification criterion. A contract cannot, however, confer powers on organs of state, but only rights. When a party thus purports to cancel a contract on the terms of that contract, that party is exercising a *right* of cancellation. The *power* to exercise the right must be pre-existing. It is thus theoretically impossible for an organ of state to derive its powers in implementation (including termination) of a contract from the contract itself.<sup>207</sup>

### 3.3 Criterion 3: The use of superior power or authority

#### 3.3.1 Development of authority as criterion

In South African law Wiechers has long pinned the distinction between those acts of the state that are subject to private law regulation and those that are subject to public law regulation on the use of state authority in the given instance.<sup>208</sup> For Wiechers, the essential characteristic of the administrative

---

power is always sourced in statutory provision, whether general or specific, and, behind it, in the Constitution.”

<sup>204</sup> 2001 3 SA 1013 (SCA).

<sup>205</sup> 1993 1 SA 405 (T).

<sup>206</sup> Pretorius (2002) 119 SALJ 374 at 385.

<sup>207</sup> Pretorius (2002) 119 SALJ 374 at 386. See also Hoexter (2004) 121 SALJ 595 at 604. But see Wade & Forsyth *Administrative Law* 220 for a contrary view. This argument goes back to the conceptualisation of the state and state power. If one accepts that the state has legal capacity like any other legal subject, it may be possible to argue that the state can indeed derive powers at common law from contracts. This seems to be the approach taken by the Constitutional Court in *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 3 SA 1151 (CC) in relation to the state's powers as (common law) land owner. See chapter two at par 3.1.2.1 and par 3.1.2.2 above.

<sup>208</sup> Wiechers *Administratiefreg* 51.

law relationship is that of “owerheidsgesag”, state authority.<sup>209</sup> Even the identity of the parties to the transaction must yield to this factor, so that a relationship between two organs of state where the one has no superior power over the other, would be governed by private law regulation and not public law regulation.<sup>210</sup> Wiechers’s approach is influenced by French law, where the exercise of superior state power or authority (*acte de la puissance publique* or *acte d’autorité*) is one of the central elements in characterising the action as governmental and subject to administrative law.<sup>211</sup>

Superior power or authority is also used in German law as a classification criterion. In terms of the *Subjektionstheorie* all relationships in which one party exercises superior authority over the other are governed by public law, while all relationships of equality are governed by private law.<sup>212</sup> Within this theory the presence of state authority in the conclusion or implementation of a contract may result in such contract being classified as an administrative act.

This approach has enjoyed considerable academic support in South Africa over the years<sup>213</sup> and has most recently received the stamp of approval

<sup>209</sup> Wiechers *Administratiefreg* 51 – 52.

<sup>210</sup> Wiechers *Administratiefreg* 52.

<sup>211</sup> Brown & Bell *French Administrative Law* 129, 135, 202; Szladits in David (ed) *International Encyclopedia of Comparative Law Volume II The Legal Systems of the World Their Comparison and Unification* par 39; Baxter *Administrative Law* 61 – 62.

<sup>212</sup> This theory is also known as the *Subordinationstheorie*. Ehlers in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 121 – 123; Gurlit in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 699; Szladits in David (ed) *International Encyclopedia of Comparative Law Volume II The Legal Systems of the World Their Comparison and Unification* par 34, 39; Floyd *Die Owerheidsooreenkoms – ‘n Administratiefregtelike Ondersoek* 78 – 79.

<sup>213</sup> See Booysen (1984) 9 *SAYIL* 56 at 60, but cf his reservations at 81; D’Oliviera *State Liability for the Wrongful Exercise of Discretionary Powers* 6; Floyd *Die Owerheidsooreenkoms – ‘n Administratiefregtelike Ondersoek* 347 – 348; Pretorius (2002) 119 *SALJ* 374 at 387; Burns *Administrative Law under the 1996 Constitution* 4 – 5, 99 – 100, 120. See also Cockrell 1997 *Acta Juridica* 26 at 31, who argues that “the existence of a structural power imbalance” in public law relationships accounts for the courts’ general willingness to subject exercises of public power to higher levels of substantive scrutiny than exercises of contractual powers, and at 50, where he argues that a comparable “disparity in

of the Supreme Court of Appeal.<sup>214</sup> Following these recent judicial pronouncements it seems that superior state power or authority is now one of the most significant factors in the classification approach of South African law.

An early example of the use of state authority as a relevant factor in classifying the action under consideration is *John Wilkinson and Partners (Pty) Ltd v Berea Nursing Home (Pty) Ltd (In Voluntary Liquidation)*.<sup>215</sup> In that case the defendant mandated the plaintiff, a firm of estate agents, to sell certain immovable assets belonging to the former.<sup>216</sup> Through the efforts of the plaintiff the Natal provincial administration became interested in the property and eventually acquired it by means of expropriation.<sup>217</sup> As a result, the plaintiff claimed agent's commission from the defendant, which denied any such liability.<sup>218</sup> After establishing that the defendant had granted the plaintiff a mandate to sell the property, the court had to determine whether the expropriation by the Natal provincial administration amounted to a sale of the property.<sup>219</sup> In holding that the expropriation could not be equated with a sale, Miller J stated:

The plaintiff has not proved that the property ... was in fact sold but has proved, on the contrary, that it was expropriated. I say 'on the contrary' because, whatever similarity there may be in the practical results of a purchase and sale of property and expropriation thereof, juridically the two concepts differ at least

---

social power" in contractual relationships move courts to increase the level of scrutiny traditionally applied to such instances.

<sup>214</sup> *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC 2001 3 SA 1013 (SCA); *Logbro Properties CC v Bedderson* NO 2003 2 SA 460 (SCA); *Transnet Ltd and Others v Chirwa* 2007 2 SA 198 (SCA) at par 54 – 55 (per Cameron JA for the minority).

<sup>215</sup> 1966 1 SA 791 (D).

<sup>216</sup> *John Wilkinson and Partners (Pty) Ltd v Berea Nursing Home (Pty) Ltd (In Voluntary Liquidation)* 1966 1 SA 791 (D) at 792.

<sup>217</sup> *John Wilkinson and Partners (Pty) Ltd v Berea Nursing Home (Pty) Ltd (In Voluntary Liquidation)* 1966 1 SA 791 (D) at 792 – 794.

<sup>218</sup> *John Wilkinson and Partners (Pty) Ltd v Berea Nursing Home (Pty) Ltd (In Voluntary Liquidation)* 1966 1 SA 791 (D) at 792.

<sup>219</sup> *John Wilkinson and Partners (Pty) Ltd v Berea Nursing Home (Pty) Ltd (In Voluntary Liquidation)* 1966 1 SA 791 (D) at 795.



in the vital respect that it is of the essence of sale that the parties voluntarily agree on all the essential terms.<sup>220</sup>

It is clear that the absence of voluntary consent on the part of the defendant to the expropriation or, conversely, the use of state authority by the Natal provincial administration in acquiring the property, was a determining factor for the judge in classifying such action as distinct from an ordinary commercial transaction of sale.

One finds a similar reference to the use of state authority in concluding the transaction in the judgement in *Ramburan v Minister of Housing (House of Delegates)*.<sup>221</sup> Although the presence of state authority in that case was clearly not the sole (or primary) factor influencing the classification of the state action under scrutiny,<sup>222</sup> it certainly was a relevant consideration. In describing the transaction between the organ of state and the individual in that case, McLaren J stated:

The applicant had no choice in the matter, except to refuse the allocation to him of the shop. Furthermore, the applicant was simply advised of the rental and the other terms of the agreements.<sup>223</sup>

Following the two judgements of the Supreme Court of Appeal in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC*<sup>224</sup> and

---

<sup>220</sup> *John Wilkinson and Partners (Pty) Ltd v Berea Nursing Home (Pty) Ltd (In Voluntary Liquidation)* 1966 1 SA 791 (D) at 795 – 796. With reference to the mandate given to the estate agent the judge said at 799: "[The defendant did] not bargain to have his contractual freedom in relation to his property entirely inhibited ... What he bargained for was a voluntary purchase and sale of his property, over the terms and conditions of which he could exercise control and he undertook to pay the agent commission only if and when such a transaction, of which the agent was the effective cause, resulted."

<sup>221</sup> 1995 1 SA 353 (D).

<sup>222</sup> The policy dimension of the action seems to have been the main factor influencing the court's finding that the action was subject to public law regulation; see par 3.5.3 below for a detailed discussion.

<sup>223</sup> *Ramburan v Minister of Housing (House of Delegates)* 1995 1 SA 353 (D) at 361.

<sup>224</sup> 2001 3 SA 1013 (SCA).

*Logbro Properties CC v Bedderson NO*<sup>225</sup> superior power or authority has now emerged as the primary criterion to classify state action in South Africa. As noted above,<sup>226</sup> in the former case the source of the power exercised seems to be the main factor influencing the classification, but in what Cora Hoexter has called the “saving grace” of the judgement,<sup>227</sup> Streicher JA stated:

The appellant is a public authority and, although it derived its power to enter into the contract with the first respondent from statute, it derived its power to cancel the contract from the terms of the contract and the common law. Those terms were not prescribed by statute and could not be dictated by the appellant by virtue of its position as a public authority. They were agreed to by the first respondent, a very substantial commercial undertaking. The appellant, when it concluded the contract, was therefore not acting from a position of superiority or authority by virtue of its being a public authority and, in respect of the cancellation, did not, by virtue of its being a public authority, find itself in a stronger position than the position it would have been in had it been a private institution. When it purported to cancel the contract it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties in respect of a commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power. Section 33 of the Constitution is concerned with the public administration acting as an administrative authority exercising public powers, not with the public administration acting as a contracting party from a position no different from what it would have been in had it been a private individual or institution.<sup>228</sup>

---

<sup>225</sup> 2003 2 SA 460 (SCA).

<sup>226</sup> See the detailed discussion of this case at par 3.2.4 above.

<sup>227</sup> Hoexter (2004) 121 SALJ 595 at 611.

<sup>228</sup> *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 3 SA 1013 (SCA) at par 18.

From this paragraph it seems that the relative bargaining power of the parties was an important factor and that the absence of any superior state power or authority weighed heavily with the court in reaching its conclusion that the action under scrutiny, viz the cancellation of the contract, was not subject to public law regulation.

It is precisely the superior state power or authority factor, which Cameron JA focused on when interpreting the *Cape Metropolitan Council* judgement<sup>229</sup> in his subsequent judgement for the court in *Logbro Properties CC v Bedderson NO*.<sup>230</sup> In the latter case, the KwaZulu-Natal provincial government awarded a tender in 1995 for the sale of a property to a tenderer other than the appellant, who also tendered for the property.<sup>231</sup> The appellant successfully challenged that award and the High Court referred the matter back to the provincial government for reconsideration.<sup>232</sup> When the remaining tenders were reconsidered by the relevant committee in 1997, it recommended a fresh call for tenders in the light of the substantial increase in property values since the original call for tenders.<sup>233</sup> The appellant again approached the High Court arguing that the committee was restricted to adjudicating the existing tenders and could not take into account new considerations such as the increase in property values.<sup>234</sup> The High Court rejected this argument.<sup>235</sup> On appeal, the provincial government argued that its actions in this case were not subject to administrative law scrutiny, but only to private law regulation.<sup>236</sup> The government argued that “the tender conditions the province stipulated gave it a contractual right to withdraw the property from tender in 1997, which could be exercised 'without having to

---

<sup>229</sup> *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC 2001 3 SA 1013 (SCA).

<sup>230</sup> 2003 2 SA 460 (SCA).

<sup>231</sup> *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) at par 2. See also Cameron JA's dissenting judgement in *Transnet Ltd and Others v Chirwa* 2007 2 SA 198 (SCA).

<sup>232</sup> *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) at par 2.

<sup>233</sup> *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) at par 3.

<sup>234</sup> *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) at par 4.

<sup>235</sup> *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) at par 4.

<sup>236</sup> *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) at par 5.

pass the scrutiny of lawful administrative action'.<sup>237</sup> For this argument the province relied on *Mustapha and Another v Receiver of Revenue, Lichtenburg and Others*<sup>238</sup> and *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others*.<sup>239</sup> In distinguishing the latter case from the present instance, Cameron JA stated:

[10] The case is thus not authority for the general proposition that a public authority empowered by statute to contract may exercise its contractual rights without regard to public duties of fairness. On the contrary: the case establishes the proposition that a public authority's invocation of a power of cancellation in a contract concluded on equal terms with a major commercial undertaking, without any element of superiority or authority deriving from its public position, does not amount to an exercise of public power.

[11] In the present case, it is evident that the province itself dictated the tender conditions, which McLaren J held constituted a contract once the tenderers had agreed to them. The province was thus undoubtedly, in the words of Streicher JA in *Cape Metropolitan*, 'acting from a position of superiority or authority by virtue of its being a public authority' in specifying those terms. The province was therefore burdened with its public duties of fairness in exercising the powers it derived from the terms of the contract.<sup>240</sup>

As a result Cameron JA found that the withdrawal of the property from the original tender process and the call for new tenders did amount to administrative action and was hence subject to public law regulation.<sup>241</sup> The central role of the superior state power exercised by the organ of state in this case is apparent.

---

<sup>237</sup> *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) at par 5.

<sup>238</sup> 1958 3 SA 343 (A).

<sup>239</sup> 2001 3 SA 1013 (SCA).

<sup>240</sup> *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) at par 10 – 11 (footnotes omitted).

<sup>241</sup> *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) at par 14.

### 3.3.2 A broad view of authority

Cameron JA's judgement in *Logbro Properties CC v Bedderson NO*<sup>242</sup> not only brings superior state power or authority to the fore in the classification of state action, but also broadens it as a classification criterion. The judge located the superior power in the fact that the organ of state unilaterally dictated the *terms* of the relationship between the parties. He did not say that the state power must be instrumental in creating the relationship *per se*, but expressly referred to the creation of the terms of the relationship, which is a broader approach than the one suggested in *John Wilkinson and Partners (Pty) Ltd v Berea Nursing Home (Pty) Ltd (In Voluntary Liquidation)*<sup>243</sup> or by academic commentators such as Wiechers. Wiechers subjects some relationships entered into voluntarily to administrative law regulation; in other words he does not insist that the relationship must be *created* unilaterally by the organ of state and that the subordinate party be forced into the relationship for it to be subject to administrative law.<sup>244</sup> However, he does maintain that an essential characteristic of such "multilateral administrative acts" is the presence of superior state power within the relationship in that the organ of state can act unilaterally and in a coercive fashion.<sup>245</sup>

The focus on the superior power or authority of the state as evidenced in the *terms* of the arrangement in Cameron JA's broader approach coincides with the use of authority as classification criterion in French law. In France it is often the terms of the agreement between the state and an individual that lead to the classification of the particular agreement as subject to administrative law.<sup>246</sup> Terms that differ materially from those found in analogous contracts between private parties and in particular terms that

---

<sup>242</sup> 2003 2 SA 460 (SCA).

<sup>243</sup> 1966 1 SA 791 (D).

<sup>244</sup> Wiechers *Administratiefreg* 90 – 94, 130 – 136.

<sup>245</sup> Wiechers *Administratiefreg* 134.

<sup>246</sup> Brown & Bell *French Administrative Law* 142 – 143, 202; Nicholas *The French Law of Contract* 26; Arnould (2001) 10 *Public Procurement LR* 324 at 335; Martin (1997) 6 *Public Procurement LR* CS166.

confer rights on the state or impose obligations on the private party to which such private party would not ordinarily agree in a private commercial transaction (*clauses exorbitantes du droit commun*)<sup>247</sup> are taken to indicate the presence of superior power or authority on the part of the state.<sup>248</sup> Such contracts would be subject to administrative law rather than private law regulation.<sup>249</sup>

Cameron JA's broader approach in the *Logbro Properties* case reveals both the strength and the weakness of superior state power or authority as classification criterion.

### 3.3.3 Advantages of a broad view of authority

The strength of the broader approach lies in the impact it has on cases where reliance on the ostensibly consensual basis of the relationship between the parties seems unrealistic or even surreal. Ogilvy Thompson JA's judgement for the majority in *Mustapha and Another v Receiver, Lichtenburgh and Others*,<sup>250</sup> where he found that the applicant's "liability to notice derives, not from some statutory provision willy-nilly forced upon him, but from his voluntary consent", is a good example. As noted above,<sup>251</sup> this finding seems completely unrealistic in the light of the fact that the terms of the agreement between the parties were exhaustively prescribed by statute, resulting in the absence of any real choice on the part of the applicants. If Cameron JA's broader approach is applied to the *Mustapha* case, the outcome is quite different. Since the terms of the agreement in that case were clearly dictated by the organ of state "acting from a position of superiority or authority by virtue

---

<sup>247</sup> Brown & Bell *French Administrative Law* 142; Nicholas *The French Law of Contract* 26; Arnould (2001) 10 *Public Procurement LR* 324 at 335.

<sup>248</sup> Martin (1997) 6 *Public Procurement LR* CS166 states "a clause is probably onerous if it is inconceivable (or unusual for certain authors), in relations between private persons as it places the private contracting party on an unequal footing vis-à-vis the public entity."

<sup>249</sup> Brown & Bell *French Administrative Law* 142 – 143; Nicholas *The French Law of Contract* 26; Arnould (2001) 10 *Public Procurement LR* 324 at 335 – 336.

<sup>250</sup> 1958 3 SA 343 (A) at 357.

<sup>251</sup> See par 3.2.1 above.

of its being a public authority”,<sup>252</sup> the termination of that agreement amounts to administrative action. It is therefore not surprising that Cameron JA overruled the majority decision in *Mustapha and Another v Receiver, Lichtenburgh and Others*.<sup>253</sup>

Another illustration of the potential impact of Cameron JA’s broader approach is the university cases discussed in paragraph 3.2.2 above. In those cases the university is clearly dictating the terms of the relationship between the parties. Any action taken under those terms would consequently be subject to public law regulation under Cameron JA’s test. This is in stark contrast to the approach taken in most of the university cases. In *Mkhize v Rector, University of Zululand*,<sup>254</sup> for example, the fact that the University, through its Council, could dictate the terms of the relationship between the University and students militated against a finding that a tacit term should be implied in the contract between the parties applying public law-like regulation to the relationship.<sup>255</sup>

### 3.3.4 Criticism of authority as criterion

The weakness of Cameron JA’s broader interpretation of superior power or authority as classification criterion is that it does not spell out why a differentiation should be made between public and private action. In fact, the very broad nature of the judge’s approach seems to undermine the classification exercise itself. This is best illustrated by the remarks of Eksteen JA in *Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affairs*.<sup>256</sup> In that case the plaintiff claimed that the defendant had granted a prospecting lease to it over certain portions of state land in terms of the

---

<sup>252</sup> *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) at par 11.

<sup>253</sup> 1958 3 SA 343 (A), *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) at par 13.

<sup>254</sup> 1986 1 SA 901 (D).

<sup>255</sup> *Mkhize v Rector, University of Zululand* 1986 1 SA 901 (D) at 904.

<sup>256</sup> 1991 4 SA 718 (A).

Precious Stones Act.<sup>257</sup> In assessing the nature of the claimed lease the judge stated:

The very wording of ... the Act underlines the contractual and therefore consensual nature of the lease. The Minister in effect binds himself to let the leaseholder prospect on the land concerned for an agreed period of time, and the leaseholder in turn agrees to pay a certain amount as rent ... The fact that the Act expressly requires certain matters to be dealt with in the lease, and in some instances gives the Minister an overriding say in determining certain terms, does not, in my view, detract from the contractual nature of the lease. After all much the same circumstances pertain to numerous commercial agreements, more particularly when an individual contracts with a large corporation and is presented with a printed form of agreement. The mere fact that the individual may not readily be able to procure the alteration of any of the terms does not detract from the fact that his acceptance of those terms would lead to a binding contract being concluded. I am therefore of the view that a prospecting lease in terms of the Act must be seen as a consensual agreement between the Minister and the leaseholder - an agreement, moreover, which, in terms of s 4(2)(a), must provide for certain prescribed matters. A failure to deal with these prescribed matters in the lease would obviously render such a lease invalid and unenforceable.<sup>258</sup>

Cameron JA's broader approach to superior power or authority as classification criterion seems to run contrary to Eksteen JA's analysis. It is an open question whether application of Cameron JA's approach to superior power in *Logbro Properties CC v Bedderson NO*<sup>259</sup> to the matter at hand in

---

<sup>257</sup> Act 73 of 1964; *Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affairs* 1991 4 SA 718 (A) at 720.

<sup>258</sup> *Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affairs* 1991 4 SA 718 (A) at 724.

<sup>259</sup> 2003 2 SA 460 (SCA).



*Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affairs*<sup>260</sup> would have made any significant difference in the latter case.<sup>261</sup> However, that is not the important point to note. Noteworthy is Eksteen JA's equation of the unilateral determination of the terms of an agreement by a public body to similar practices commonly found in (private) commercial transactions. This equation fatally undermines superior power or authority, in the broad view adopted by Cameron JA, as a criterion to distinguish state action subject to public law regulation from state action subject to private law regulation.

Baxter raises a similar point of critique against the use of superior power or authority as a classification factor in French law and by Wiechers in South African law.<sup>262</sup> However, Baxter's criticism is even more fundamental than that raised above, since his is aimed at the narrower approach to authority suggested by Wiechers rather than the broader approach of Cameron JA in the *Logbro Properties* case. Baxter argues that superior power or authority cannot be a decisive factor in distinguishing public relationships from private ones since instances of authority are also common in the latter group of relationships.<sup>263</sup> He points to guardianship as an example. Wiechers acknowledges this argument, but states that the purpose or content of the relationship of authority in private law is aimed at private interests rather than public ones such as in public law relationships.<sup>264</sup> Baxter rightly responds that

---

<sup>260</sup> 1991 4 SA 718 (A).

<sup>261</sup> In the latter case Eksteen JA expressly recognised that the organ of state was acting as a public body and that public law consequently applied. However, according to the judge, that made no difference. The judgement ultimately turned on the interpretation of the relevant sections of the Precious Stones Act 73 of 1964. Whether the creation of the prospecting lease was a unilateral administrative act or a consensual agreement seemed to make little difference. *Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affairs* 1991 4 SA 718 (A) at 725.

<sup>262</sup> Baxter *Administrative Law* 61.

<sup>263</sup> Baxter *Administrative Law* 61 note 95. See also Szladits in David (ed) *International Encyclopedia of Comparative Law Volume II The Legal Systems of the World Their Comparison and Unification* par 34; Singh *German Administrative Law in Common Law Perspective* 9; Ehlers in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 123.

<sup>264</sup> Wiechers *Administratiefreg* 4. Wiechers also argues that the private relationship of authority can be distinguished from the public one on the ground of the difference in the

public interest does not seem any less relevant in the legal regulation of private relationships of authority; in fact those are the best examples of the influence of public interest in private law.<sup>265</sup>

Craig identifies a similar line of reasoning in English case law in criticism of superior power as classification criterion.<sup>266</sup> He argues that one principal strand in the courts' approach to subjecting the actions of ostensibly private bodies to public law judicial regulation is the insight that "not all power is public power."<sup>267</sup> This is best illustrated by the following remarks of Hoffmann LJ in *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan*.<sup>268</sup>

But the mere fact of power, even over a substantial area of economic activity, is not enough. In a mixed economy, power may be private as well as public. Private power may affect the

---

parties involved, ie in private law the parties are private parties, whereas in public law there are organs of state involved, and because in the private relationship of authority the subordinate party is placed in that position due to a lack in legal capacity or in the interest of social expediency. Neither of these grounds is particularly convincing. The first one simply begs the question and does not tell us why a distinction is made. Furthermore, it is at odds with the recognition, subscribed to by Wiechers himself, that not all relationships of organs of state are public relationships; see par 3.1.1 above. The second ground is not any more enlightening either. The lack in legal capacity is simply a legal concept and in itself does not shed any light on the reasons why the particular legal subject is subordinated to another and Wiechers gives no indication of what the social expediency he refers to may be. Whatever such social expediency may amount to, surely a similar argument can be made in relation to the protection of individuals against superior power of the state; cf Steyn *Die Aanspreeklikheid van die Staat vir die Onregmatige Dade van sy Dienare* 17 (describing these relationships of authority as based on "praktiese konsiderasies aan die privaatreg eie" (pragmatic considerations unique to private law (my translation))). See also Floyd *Die Owerheidsooreenkoms – 'n Administratiefregtelike Ondersoek* 348, who advances similar arguments to that of Wiechers, which are therefore subject to the same criticism. Floyd, in addition, resorts to the source of the power exercised as a ground of distinction here. However, such ground is subject to the criticism against source as classification criterion raised in par 3.2 above and is thus not any more convincing than any of the other grounds advanced.

<sup>265</sup> Baxter *Administrative Law* 61 note 95.

<sup>266</sup> Craig in Taggart (ed) *The Province of Administrative Law* 204.

<sup>267</sup> Craig in Taggart (ed) *The Province of Administrative Law* 204.

<sup>268</sup> [1993] 2 All ER 853 at 875.

public interest and the livelihoods of many individuals. But that does not subject it to the rules of public law. If control is needed it must be found in the law of contract, the doctrine of restraint of trade, the Restrictive Trade Practices Act 1976, arts 85 and 86 of the EEC Treaty and all the other instruments available for curbing the excesses of private power.

Although this line of reasoning is aimed at the public or private regulation of the actions of private bodies, it can just as well apply to the current analysis in respect of the regulation of state activity. This argument simply illustrates that the mere existence of superior power does not warrant any conclusions regarding the public or private judicial regulation of the associated action.<sup>269</sup>

Cameron JA counters some of the criticism raised above in a qualification he put on superior power or authority as classification criterion in *Logbro Properties CC v Bedderson NO*.<sup>270</sup> The principle the judge distilled from *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others*<sup>271</sup> is not simply that action taken by an organ of state with an “element of superiority or authority”<sup>272</sup> or “from a position of superiority or authority”<sup>273</sup> will be subject to public law regulation. Such use of superiority or authority by the organ of state must furthermore derive “from its public position” and “by virtue of its being a public authority”.<sup>274</sup> It seems that Cameron JA had something more in mind than simply superior power or authority. It is superior power or authority deriving from a specific source or linked to a specific position, viz a public one, that activates public law

---

<sup>269</sup> See also the rejection of inequality (ie superior power) as a factor that motivates the existence of special restitutionary rules for public bodies in English law by Jack Beatson on the grounds that similar inequality exists between various private parties, eg an individual and a large commercial concern, and that such inequality does not always (and hence necessarily) exist between public bodies and private concerns: Beatson 1997 *Acta Juridica* 1 at 17, (1993) 109 *LQR* 401 at 411 *et seq*.

<sup>270</sup> 2003 2 SA 460 (SCA).

<sup>271</sup> 2001 3 SA 1013 (SCA).

<sup>272</sup> *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) at par 10.

<sup>273</sup> *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) at par 11.

<sup>274</sup> *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) at par 11.

regulation and not the superior power or authority alone. This qualification on superior power or authority results in a more nuanced classification criterion that effectively distinguishes between public and private relationships.

Cameron JA's qualification on superior power does not, however, free his approach from all criticism. As noted above,<sup>275</sup> it is especially in the current commercial context that the identity of the actor seems less convincing as a classification factor. Linking the identity of the actor to superior power or authority thus does not solve all problems and the resultant classification criterion is open to much of the criticism levelled at the two factors individually. The same argument would apply if Cameron JA had the source of the superior power or authority in mind as qualification rather than the identity of the actor.<sup>276</sup> On both these readings Cameron JA's approach seems to be in line with Hoffmann LJ's remarks in *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan*,<sup>277</sup> quoted above. Only superior power of a public nature will hence be subject to public law regulation, while (superior) power of a private nature will be subject to private law regulation. Stated in this way, it is evident that superior power *per se* is no longer the distinguishing factor.

The only use of superior power or authority as classification criterion that is safe from the above criticism, especially that raised by Eksteen JA in *Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affairs*,<sup>278</sup> would be in those instances where the subordinate party to the relationship is forced into the relationship. That is where the subordinate party had no choice about entering into the relationship. Again *John Wilkinson and Partners (Pty) Ltd v Berea Nursing Home (Pty) Ltd (In Voluntary*

---

<sup>275</sup> See par 3.1.1 above.

<sup>276</sup> Although taken as a whole Cameron JA's qualification of superior power or authority in paragraphs 10 and 11 of the judgement seems to suggest that he has the public identity of the actor in mind, the words "deriving from" used in paragraph 10 may point to the source of the authority rather than the identity of the actor: *Logbro Properties CC v Bedderson NO 2003 2 SA 460 (SCA)* at par 10 – 11.

<sup>277</sup> [1993] 2 All ER 853 at 875.

<sup>278</sup> 1991 4 SA 718 (A) at 724, quoted at note 258 above.

*Liquidation*)<sup>279</sup> is the prime example. There the distinction between a transaction of sale and expropriation can effectively be made on the grounds of superior state power or authority. The defendant had no choice regarding the acquisition of its property by the administration.<sup>280</sup> However, in a commercial context such situations would not often arise and the relevance of superior power or authority for classifying state commercial action seems less compelling.<sup>281</sup>

### 3.3.5 Relevance of the actor's intention

Booyesen makes the important point that the intention of the state party is crucial in establishing whether it acted with superior power or authority.<sup>282</sup> For example, when the state contemplates acquiring a property, such as in *John Wilkinson and Partners (Pty) Ltd v Berea Nursing Home (Pty) Ltd (In Voluntary Liquidation)*,<sup>283</sup> it can either proceed by means of an agreement of sale or by means of expropriation.<sup>284</sup> In many instances the state will have a choice regarding these options.<sup>285</sup> Its intention in using the one rather than the other is thus highly relevant in classifying its resultant action as subject to private or public law regulation.

The same reasoning applies to the broader approach adopted by Cameron JA in *Logbro Properties CC v Bedderson NO*.<sup>286</sup> This is apparent in

---

<sup>279</sup> 1966 1 SA 791 (D).

<sup>280</sup> See par 3.3.1 above for a detailed discussion.

<sup>281</sup> See also Booyesen (1984) 9 SAYIL 56 at 60, who argues that since agreement is essentially based on voluntary consent, the presence of authority in the absolute form contemplated here seems to deny the very possibility of an agreement governed by public law. Since much of commercial action is based on agreement, this argument can be extended to state commercial action generally.

<sup>282</sup> Booyesen (1984) 9 SAYIL 56 at 60.

<sup>283</sup> 1966 1 SA 791 (D). See also the foreign case law quoted by Booyesen (1984) 9 SAYIL 56 at 60 notes 19 and 20.

<sup>284</sup> Booyesen (1984) 9 SAYIL 56 at 60.

<sup>285</sup> It will not have a free choice in all cases, since the owner may not want to enter into negotiations in order to reach agreement, in which case expropriation will be the only option.

<sup>286</sup> 2003 2 SA 460 (SCA).

French law, where the state party has a choice to use *clauses exorbitantes* in concluding an agreement with a private party with resultant application of public or private law regulation.<sup>287</sup> That choice is of significance since it may provide an avenue to challenge the state's actions separate from the agreement itself.<sup>288</sup>

This is an important point to which I shall return later.<sup>289</sup> At present it is relevant to note that the use of superior power or authority may not be a classification criterion in itself, but simply an indicator of an underlying criterion, viz the intention of the state party. The presence of superior power or authority consequently is rather the *result* of a choice for public form over private form than the classification criterion to establish which form is used.<sup>290</sup> Just as the mere presence of a contract may not be dispositive in ascertaining whether public or private regulation should apply, the presence of superior power or authority cannot be determinative.

This realisation may counter another criticism against superior power or authority as classification criterion. Booyesen argues that authority as criterion is unhelpful since the state is always "in a stronger position than the individual by virtue of its possessing the authority of state."<sup>291</sup> If one accepts, however, that evidence of superior power or authority is only indicative of the intention of the state party, or more precisely its choice to use public forms rather than private ones, and that such intention or choice is the actual classification criterion, then the state's *potentially* stronger position is of lesser relevance.

---

<sup>287</sup> Brown & Bell *French Administrative Law* 143; Martin (1997) 6 *Public Procurement LR* CS166.

<sup>288</sup> Brown & Bell *French Administrative Law* 203.

<sup>289</sup> See par 4 below.

<sup>290</sup> See Szladits in David (ed) *International Encyclopedia of Comparative Law Volume II The Legal Systems of the World Their Comparison and Unification* par 34.

<sup>291</sup> Booyesen (1984) 9 *SAYIL* 56 at 81. Whether this statement is in fact true is not beyond dispute. One can imagine instances where the state may not be in a stronger position than the counterparty to a particular commercial arrangement, for example, where an organ of state, such as Transnet, borrows money from a large investment bank with a better credit rating than the South African government, such as JP Morgan Chase Bank, NA.

In this regard the identification and role of *clauses exorbitantes* in French law is particularly instructive.<sup>292</sup>

### 3.4 Criterion 4: Public interest in the action

A criterion that has often been suggested by academic commentators and courts alike in classifying state action is that of public interest. In South African law Baxter argues that the ultimate test of whether a body is a public body is whether it is under a duty to act in the public interest and not simply to its own private advantage.<sup>293</sup> Even Wiechers, who has insisted on superior power or authority as the ultimate criterion to identify administrative action,<sup>294</sup> declares that the state can never act completely in terms of private law due to the underlying public interest of all state action.<sup>295</sup> In English law Lord Woolf is one of the foremost advocates of public interest as the critical criterion to distinguish public from private law. In an influential article he states:

The critical distinction [between private and public law] arises out of the fact that it is the public as a whole...who are the beneficiaries of what is protected by public law and it is the

---

<sup>292</sup> Such an approach would also address Currie & Klaaren's criticism of *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC 2001 3 SA 1013 (SCA) (and *Logbro Properties CC v Bedderson* NO 2003 2 SA 460 (SCA)) that the classification is "difficult and tenuous" and turns on the "fine assessment of equality of bargaining position", *The Promotion of Administrative Justice Act Benchbook* 73 – 74.

<sup>293</sup> Baxter *Administrative Law* 100.

<sup>294</sup> See par 3.3.1 above.

<sup>295</sup> Wiechers in Strauss (ed) *Huldigingsbundel vir WA Joubert* 281. See also Pretorius (2002) 119 SALJ 374 at 387, 395 – 396; Burns & Beukes *Administrative Law under the 1996 Constitution* 172, 176 (with specific reference to "administrative agreements"), 364; Plasket in Glover (ed) *Essays in Honour of AJ Kerr* 160; Bolton *The Law of Government Procurement in South Africa* 5, 22, 94. This view is also taken in German law, where it is argued that the *Rechtsstaatsprinzip* requires that all state action must serve a public purpose: Ehlers (1990) 45 JZ 1089 at 1091, in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 21, 155.

individuals or bodies entitled to the rights who are the beneficiaries of the protection provided by private law.<sup>296</sup>

This approach is in line with the *Interessentheorie* of German law, where the distinction between private and public is similarly made on the grounds of the purpose of or the interests served by the rule (or material) to be classified.<sup>297</sup>

### 3.4.1 Public interest illustrated in town-planning cases

The use of public interest as classification criterion in case law is well illustrated by a number of judgements dealing with town-planning disputes.

In *Peri-Urban Areas Health Board v Estate Breet*<sup>298</sup> and on appeal to the full bench of the High Court, *Estate Breet v Peri-Urban Areas Health Board*<sup>299</sup> and further appeal to the Appellate Division, *Estate Breet v Peri-Urban Areas Board*,<sup>300</sup> it was laid down that the relationship between a land owner in an

---

<sup>296</sup> Woolf 1986 *Public Law* 220 at 221. See the criticism of this view by Fredman & Morris 1994 *Public Law* 69 at 73, who argue that Lord Woolf's approach is not supported by case law.

<sup>297</sup> Ehlers in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 122 – 123; Szladits in David (ed) *International Encyclopedia of Comparative Law Volume II The Legal Systems of the World Their Comparison and Unification* par 36, 56; Pakuscher (1971) 20 *Journal of Public Law* 273 at 283; Singh *German Administrative Law in Common Law Perspective* 8; Floyd *Die Owerheidsooreenkoms – 'n Administratiefregtelike Onderzoek* 77. This is not to say that public interest is a determinative criterion in classifying state contracts in German law as either subject to public or private regulation. As noted in chapter one, the *öffentlichrechtlicher Vertrag* of German law is used only in a narrowly circumscribed number of instances, see chapter one at par 4.3.2.2 above. The *Interessentheorie* is used more generally to distinguish between private and public law, although Ehlers in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 123 notes that it is hardly still supported, especially as a theory than can distinguish between public and private law on its own. It is relevant here since the factors it highlights as relevant are closely aligned to public interest as used in South African law to distinguish between state action that is subject to private law and public law respectively. Due to this similarity the insights developed under the *Interessentheorie* may be of assistance in this more narrow context.

<sup>298</sup> 1954 1 SA 451 (T).

<sup>299</sup> 1955 3 SA 534 (T).

<sup>300</sup> 1955 3 SA 523 (A).



application for a township development and the administrator granting such application is not a contractual one for the purposes of the Prescription Act.<sup>301</sup> In this matter the land owner applied for the proclamation of a township development on a portion of his land, which application was granted by the administrator of the Transvaal in terms of the relevant town-planning ordinances.<sup>302</sup> One of the conditions attached to the proclamation of the township was that the township owner must pay a certain percentage of the value of all lots sold as an endowment to the local authority under whose jurisdiction the township fell.<sup>303</sup> Directly following the proclamation of the township, the land owner sold and transferred all the lots in the township<sup>304</sup> to a company.<sup>305</sup> Following the township owner's failure to pay the endowment to the local authority as required by the conditions of the township proclamation, the local authority applied to the High Court for an order directing the estate of the late township owner (the respondents) to supply it with audited statements of all lots sold.<sup>306</sup> The respondents resisted the application on the ground that the local authority's claim has prescribed in terms of the Prescription Act.<sup>307</sup> It argued that the local authority's cause of action was based on contract that becomes prescribed at the latest after a period of six years from the date upon which it arose.<sup>308</sup> The respondents further argued that the cause of action arose when all the lots were sold and transferred to the company by the land owner and that more than six years have already passed in the current instance.<sup>309</sup> Having failed in the High Court both at first instance and before the full bench with this argument, the respondents appealed to the Appellate Division, where the sole issue for

---

<sup>301</sup> Act 18 of 1943.

<sup>302</sup> *Estate Breet v Peri-Urban Areas Board* 1955 3 SA 523 (A) at 525.

<sup>303</sup> *Estate Breet v Peri-Urban Areas Board* 1955 3 SA 523 (A) at 525.

<sup>304</sup> Excluding those lots which were earmarked for transfer to the state and local authority in terms of the conditions of the township proclamation, *Estate Breet v Peri-Urban Areas Health Board* 1955 3 SA 534 (T) at 536.

<sup>305</sup> *Estate Breet v Peri-Urban Areas Health Board* 1955 3 SA 534 (T) at 535 – 536.

<sup>306</sup> *Estate Breet v Peri-Urban Areas Board* 1955 3 SA 523 (A) at 526.

<sup>307</sup> Act 18 of 1943; *Estate Breet v Peri-Urban Areas Board* 1955 3 SA 523 (A) at 526.

<sup>308</sup> *Estate Breet v Peri-Urban Areas Board* 1955 3 SA 523 (A) at 526.

<sup>309</sup> *Estate Breet v Peri-Urban Areas Board* 1955 3 SA 523 (A) at 526.

decision was whether the local council's claim was based on contract or statute for the purposes of the Prescription Act.<sup>310</sup> The court held that the claim was not based on contract and rejected the respondents' defence.<sup>311</sup> In analysing the relationship between the land owner and the administrator, a number of judges pointed to the relevance of public interest in reaching the conclusion that such relationship was not one of contract, but rather a statutory or regulative relationship of public law.<sup>312</sup> Schreiner JA (in the majority opinion) pointed to public interest as the very first factor bringing him to his conclusion:

I am led to the conclusion that the respondent's claim is not in respect of a contract within the meaning of the Prescription Act by the following considerations. The Ordinance provides for the establishment of a township by the carrying out of a series of steps designed to protect the interests not only of the applicant but also of the persons who will be acquiring property in the township and who will become its residents and the users of its amenities.<sup>313</sup>

In a concurring opinion Van den Heever JA stated:

The powers exercised by the Administrator under Ord. 11 of 1931 in connection with the establishment of a new township are purely regulative. In the interests of fairness and in the public interest the Ordinance describes certain checks and balances which condition the exercise of his powers.<sup>314</sup>

In the light of the conclusion of the Appellate Division in *Estate Breet v Peri-Urban Areas Board*<sup>315</sup> it is curious that the relationship between the respondent council and the applicant land owners with regard to special

---

<sup>310</sup> Act 18 of 1943; *Estate Breet v Peri-Urban Areas Board* 1955 3 SA 523 (A) at 526.

<sup>311</sup> *Estate Breet v Peri-Urban Areas Board* 1955 3 SA 523 (A) at 531 – 532.

<sup>312</sup> *Estate Breet v Peri-Urban Areas Board* 1955 3 SA 523 (A) at 531 per Schreiner JA, 533 per Van den Heever JA and at 534 per Steyn JA.

<sup>313</sup> *Estate Breet v Peri-Urban Areas Board* 1955 3 SA 523 (A) at 531.

<sup>314</sup> *Estate Breet v Peri-Urban Areas Board* 1955 3 SA 523 (A) at 533.

<sup>315</sup> 1955 3 SA 523 (A).

consent use of the applicants' property was categorised as contractual in *De Vroeg en 'n Ander v Stadsraad van Randburg*.<sup>316</sup> However, it seems that the judgement in *Mustapha and Another v Receiver, Lichtenburgh and Others*,<sup>317</sup> which was delivered subsequent to that in *Estate Breet v Peri-Urban Areas Board*,<sup>318</sup> played a critical role in Moll AJ's ruling in *De Vroeg en 'n Ander v Stadsraad van Randburg*.<sup>319</sup> Moll AJ agreed with the respondent that the relationship between it and the applicants was contractual and that the *audi* principle hence did not apply stating:

Op die feite in die onderhawige geval is die aanbod van die kant van die respondent deur die twee applikante aanvaar en gevolglik was die verhouding tussen die partye daarna gereël deur die kontrak wat diensengevolge tot stand gekom het. Indien die respondent derhalwe hierna met betrekking tot gemelde toestemming wou optree, sou hy dit uit hoofde van sodanige kontraktuele verhouding doen en nie kragtens die bepalings van die Ordonnansie en/of skema nie ... Dit volg ... dat indien dit beweer sou word deur die respondent dat die twee applikante nie die bepalings van een of meer van die gemelde voorwaardes nagekom het nie, dit wel geoorloof sou wees om

---

<sup>316</sup> 1970 2 SA 132 (T).

<sup>317</sup> 1958 3 SA 343 (A).

<sup>318</sup> 1955 3 SA 523 (A).

<sup>319</sup> 1970 2 SA 132 (T). In this case the council consented to the use of the applicants' residential property for the purposes of a crèche in departure from the zoning scheme which restricted the use of buildings on the property to "dwelling houses", but allowed for special consent for the use of the buildings as "[p]laces of public worship, places of instruction, social halls, institutions, special buildings" (at 134). Having obtained such consent, the applicants operated a day care center from the property. Five years after the consent was granted the applicants received a letter from the council informing them that the special consent has been retracted and that the use of the property as a day care facility should be terminated. The applicants challenged the retraction of the special consent on a number of grounds, *inter alia* for a failure to comply with the requirements of the *audi alteram partem* principle, which, according to the applicants, applied in the current context. The respondent countered this argument with reliance on *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) arguing that the relationship between it and the applicants was contractual and that the *audi* principle hence did not apply.

op grond van kontrakbreuk die gemelde vergunning (kontrak) te kanselleer ... Indien dit so is, en regtens is daar, myns insiens, geen rede waarom die respondent hom nie hierop kan beroep nie, dan sou daar geen rede bestaan waarom die respondent vooraf kennis van sy voorneme aan die twee applikante, soos deur hulle vereis, sou moes laat toekom nie. Dit volg ook ... dat die gevolge wat gewoonweg intree wanneer een party tot 'n kontrak gemelde kontrak kanselleer op grond daarvan dat daar 'n verbreking van 'n wesentlike bepaling van sodanige kontrak deur die ander party geskied het, hier ook moet geld.<sup>320</sup>

The artificial source-based reasoning of *Mustapha and Another v Receiver, Lichtenburgh and Others*<sup>321</sup> did not, however, hold sway in the town-planning context to the exclusion of public interest as classification factor for long. In *Transvaalse Raad vir die Ontwikkeling van Buite-Stedelike Gebiede v Steyn Uitzicht Beleggings (Edms) Bpk*<sup>322</sup> the reasoning in *De Vroeg en 'n Ander v Stadsraad van Randburg*<sup>323</sup> was rejected and public interest was once again highlighted as an important criterion in classifying the relevant state action.<sup>324</sup> In the former case, similar to the facts in the latter case, the land owner

---

<sup>320</sup> *De Vroeg en 'n Ander v Stadsraad van Randburg* 1970 2 SA 132 (T) at 139 – 140 (On the facts of this matter, the offer by the respondent was accepted by the two applicants and subsequently the relationship between the parties was governed by the contract that came into existence. Should the respondent wish to act in relation to the permission, he would have done so in terms of the contractual relationship and not in terms of the provisions of the Ordinance and/or zoning scheme ... It follows that should the respondent claim that the applicants did not comply with the terms of one or more of the conditions, it would be at liberty to cancel the permission (contract) for breach of contract ... Should this be the case, and legally there seems to me to be no reason why the respondent cannot rely on such argument, there would be no reason why the respondent should notify the applicants in advance of its intention, as claimed by the applicants. It also follows that the normal consequences that follow a breach of a fundamental term of such contract by the other party should exist here (my translation)).

<sup>321</sup> 1958 3 SA 343 (A). See par 3.2.1 above for a discussion and criticism of this approach.

<sup>322</sup> 1977 3 SA 351 (T).

<sup>323</sup> 1970 2 SA 132 (T).

<sup>324</sup> *Transvaalse Raad vir die Ontwikkeling van Buite-Stedelike Gebiede v Steyn Uitzicht Beleggings (Edms) Bpk* 1977 3 SA 351 (T) at 360.

applied for and was granted special consent for use of its property in a departure from the zoning scheme.<sup>325</sup> Upon the owner's failure to comply with the conditions attached to the special consent, the local authority cancelled such consent and applied to the High Court for an order directing the land owner to terminate the special use.<sup>326</sup> The local authority expressly relied on the judgement in *De Vroeg en 'n Ander v Stadsraad van Randburg*<sup>327</sup> in its action to cancel the consent.<sup>328</sup> In rejecting the approach in the last-mentioned judgement, Van Reenen J stated:

[Dit is] duidelik dat 'n vergunde gebruik met enige meegaande voorwaardes nie net 'n aangeleentheid is wat die plaaslike bestuur en die aansoekdoener raak nie. Die openbare belang is daarby gemoeid. Uit die aard van die saak moet dit so wees. Die wyse waarop 'n bepaalde stuk grond gebruik staan te word, kan van wesentlike belang vir ander grondeienaars en okkupeerders wees. Daarom word hulle geken, nie net by die oorweging of die vergunde gebruik toegestaan word nie, maar ook wat betref die voorwaardes waaronder daardie gebruik beoefen mag word. 'n Mens kan jou maklik voorwaardes by bepaalde gebruike indink wat juis ter beskerming of ter voordeel van ander persone neergelê word. Hierdie oorweging alleen is al voldoende om te toon dat die vergunde gebruik met sy voorwaardes nie bloot 'n kontraktuele aangeleentheid is tussen die aansoekdoener en die plaaslike bestuur nie.<sup>329</sup>

---

<sup>325</sup> *Transvaalse Raad vir die Ontwikkeling van Buite-Stedelike Gebiede v Steyn Uitzicht Beleggings (Edms) Bpk* 1977 3 SA 351 (T) at 352.

<sup>326</sup> *Transvaalse Raad vir die Ontwikkeling van Buite-Stedelike Gebiede v Steyn Uitzicht Beleggings (Edms) Bpk* 1977 3 SA 351 (T) at 352.

<sup>327</sup> 1970 2 SA 132 (T).

<sup>328</sup> *Transvaalse Raad vir die Ontwikkeling van Buite-Stedelike Gebiede v Steyn Uitzicht Beleggings (Edms) Bpk* 1977 3 SA 351 (T) at 354.

<sup>329</sup> *Transvaalse Raad vir die Ontwikkeling van Buite-Stedelike Gebiede v Steyn Uitzicht Beleggings (Edms) Bpk* 1977 3 SA 351 (T) at 355 (It is clear that a special use consent including any attached conditions is not a matter that only concerns the local council and the applicant. It also involves public interest. This must necessarily be the case. The manner in which a particular piece of land is used may be of critical interest to other land owners and

Van Reenen J furthermore pointed to the decision in *Estate Breet v Peri-Urban Areas Board*<sup>330</sup> as important in deciding the matter before him rather than the majority judgement in *Mustapha and Another v Receiver, Lichtenburgh and Others*<sup>331</sup> and concluded:

Die plaaslike bestuur tree by oplegging van voorwaardes nie in eie belang op nie, maar in belang van die publiek, en veral die omliggende grondeienaars en gebruikers. Net soos in die geval van dorpsstigting word voorsiening gemaak vir die doen van 'n reeks stappe wat gemik is, nie net op die beskerming van die aansoekdoener se belange nie, maar ook dié van die ander lede van die publiek wat geraak kan word.<sup>332</sup>

The judge acknowledged that the Appellate Division decided a narrow point in *Estate Breet v Peri-Urban Areas Board*,<sup>333</sup> viz the classification of state action for the purposes of the Prescription Act,<sup>334</sup> but abstracted a more general approach from that decision which he regarded as applicable to the case at hand.<sup>335</sup> Van Reenen J's judgement is thus a good illustration of the more general use of public interest as classification criterion.

---

occupiers. For that reason they are involved, not only in considering whether the special consent must be given, but also in relation to the conditions that must be attached to the special use. One can easily imagine conditions to a particular use of land that are imposed for the protection or advantage of other persons. This consideration alone is already adequate to show that special use consent with its conditions is not simply a contractual matter between the council and applicant (my translation)).

<sup>330</sup> 1955 3 SA 523 (A).

<sup>331</sup> 1958 3 SA 343 (A). See par 3.2.1 above for a discussion and criticism of this approach.

<sup>332</sup> *Transvaalse Raad vir die Ontwikkeling van Buite-Stedelike Gebiede v Steyn Uitzicht Beleggings (Edms) Bpk* 1977 3 SA 351 (T) at 357 (The local council does not act in its own interest when imposing conditions, but in the interest of the public, and in particular the interests of the neighbouring land owners and users. Just as in the case of the establishment of a township provision is made for taking a number of steps that are aimed, not only at the protection of the applicant's interests, but also those of other members of the public that stand to be affected (my translation)).

<sup>333</sup> 1955 3 SA 523 (A).

<sup>334</sup> Act 18 of 1943.

<sup>335</sup> *Transvaalse Raad vir die Ontwikkeling van Buite-Stedelike Gebiede v Steyn Uitzicht Beleggings (Edms) Bpk* 1977 3 SA 351 (T) at 359.

A clear example of public interest as classification criterion in the town-planning context is the judgement of Nestadt J for the full bench of the High Court in *Oertel and Others NNO v Director of Local Government and Others*.<sup>336</sup> In that case the township owner failed to comply with a number of conditions attached to the proclamation of such township relating to the construction of infrastructure in the township.<sup>337</sup> As a result of this failure, all transfers of lots in the township were refused until such time as the conditions were fulfilled.<sup>338</sup> The applicants, as liquidators of the township owner, consequently challenged the refusal to transfer the lots on the ground that the original conditions of township establishment have prescribed.<sup>339</sup> The defendants denied the applicability of prescription.<sup>340</sup> In finding that prescription did not run in respect of the conditions at stake in the present dispute, Nestadt J quoted the following extracts from Wessels *The Law of Contract in South Africa*:

As a general rule, prescription did not, according to the common law, run against the Crown, but where debts were due the Crown as though, it were a private individual, prescription would run against it ... Thus, we have seen that under the common law prescription does not run against the Crown as regards its inalienable rights, though in those cases where the Crown may be regarded as an ordinary creditor, prescription will run against it.<sup>341</sup>

---

<sup>336</sup> 1981 4 SA 491 (T).

<sup>337</sup> *Oertel and Others NNO v Director of Local Government and Others* 1981 4 SA 491 (T) at 496.

<sup>338</sup> *Oertel and Others NNO v Director of Local Government and Others* 1981 4 SA 491 (T) at 497.

<sup>339</sup> *Oertel and Others NNO v Director of Local Government and Others* 1981 4 SA 491 (T) at 497.

<sup>340</sup> *Oertel and Others NNO v Director of Local Government and Others* 1981 4 SA 491 (T) at 497.

<sup>341</sup> Par 2777, 2830; *Oertel and Others NNO v Director of Local Government and Others* 1981 4 SA 491 (T) at 500.

Public interest features prominently as a relevant consideration in Nestadt J's assessment of when the state acts as "an ordinary creditor". In this regard he stated:

The conclusion which I think can legitimately be come to on the brief review of our common law principles of prescription is the following. Whilst the exact juristic basis of the limitation on the running of prescription, whether acquisitive or extinctive, against the State in the authorities specified is not given, it would appear to rest not so much on the nature of the obligation *per se* but on broad considerations of public policy akin to the Crown prerogative of the English law. The limitations apply where the right or property in question is respectively exercised or set aside for the benefit of the public as opposed to the case where the State engages in commercial enterprises and acts as an ordinary creditor for its own direct benefit only ... The result is ... that ... the conditions of establishment give rise to rights which are for the benefit of the public and of a kind which, despite [the Prescription] Act 68 of 1969, are not, in accordance with common law principles, subject to prescription...<sup>342</sup>

Nestadt J's judgement was, however, reversed on appeal.<sup>343</sup> The Appellate Division found that extinctive prescription does run against the state in respect of public law debts, just as it would run against the state in respect of private law debts, both at common law and in terms of the Prescription Acts of 1943<sup>344</sup> and 1969.<sup>345</sup> Although the court did not reject the distinction between public and private debts, but simply ruled that the rules of prescription also apply to public law debts, based on an extensive analysis of the common law and interpretations of the various Prescription Acts, it did cast some doubt on public interest as classification criterion in this regard. In answer to the

---

<sup>342</sup> *Oertel and Others NNO v Director of Local Government and Others* 1981 4 SA 491 (T) at 501, 507, see also at 505.

<sup>343</sup> *Oertel en Andere NNO v Direkteur van Plaaslike Bestuur en Andere* 1983 1 SA 354 (A).

<sup>344</sup> Act 18 of 1943.

<sup>345</sup> Act 68 of 1869; *Oertel en Andere NNO v Direkteur van Plaaslike Bestuur en Andere* 1983 1 SA 354 (A) at 374 – 375.



argument by the defendants that the conditions of township establishment did not constitute a “debt” in terms of the Prescription Act,<sup>346</sup> Van Heerden AJA said:

Die betoog namens die Stadsraad was dat die betrokke plaaslike bestuur ... nie as 'n gewone skuldeiser beskou kan word nie omdat stigtingsvoorwaardes primêr strek tot voordeel van die toekomstige inwoners van 'n dorp. Hieroor hoef slegs gesê te word dat die oploop van 'n skuld teenoor iemand in een of ander vorm van verteenwoordigende hoedanigheid hoegenaamd nie vreemd aan ons reg is nie. 'n Mens hoef slegs te dink aan 'n kurator van 'n insolvente boedel, 'n kurator *bonis* en 'n trustee ingevolge 'n trustakte.<sup>347</sup>

The examples used here by Van Heerden AJA to illustrate the familiarity of South African law with debtor-creditor relationships through representation were all taken from private law and are also familiar in the private commercial context. The denial of the relevance of public interest due to analogous conditions in private law certainly undermines public interest as classification criterion.

### 3.4.2 Recent revival of public interest as criterion

More recently the Supreme Court of Appeal has, however, again pointed to public interest as a relevant classification criterion in a number of judgements.

In *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere*,<sup>348</sup> Howie JA expressed the formula “public money was being spent by a public

---

<sup>346</sup> Act 68 of 1969.

<sup>347</sup> *Oertel en Andere NNO v Direkteur van Plaaslike Bestuur en Andere* 1983 1 SA 354 (A) at 375 – 376 (The argument for the Council was that the relevant local authority cannot be viewed as a normal creditor because the conditions of establishment are primarily aimed at the advantage of the future inhabitants of a town. In response it can simply be noted that liability in favour of a person in some form of representative capacity is nothing strange to our law. One can think of a curator of an insolvent estate, a curator *bonis* and a trustee under a trust deed (my translation)).

<sup>348</sup> 1997 2 All SA 548 (SCA) at 552.

body in the public interest”<sup>349</sup> to indicate that a decision to award a state tender amounted to administrative action. This reasoning was subsequently applied in *Transnet Ltd v Goodman Brothers (Pty) Ltd*.<sup>350</sup>

In *Bullock NO v Provincial Government, North West Province*<sup>351</sup> the disposal of a right in property by an organ of state was in dispute. In that case the Premier of the North West Province granted a servitude to an adjoining private property owner over part of the northern foreshore of the Hartebeestpoort Dam, ownership of which vested in the provincial government.<sup>352</sup> The Premier acted under the impression, created by a legal opinion, that the particular neighbouring owner had a contractual right to such servitude, dating from 1918.<sup>353</sup> However, the Transvaal Yacht Club, another adjacent property owner, had enjoyed the use of this foreshore since 1969 in terms of a series of leases concluded between it and the provincial government.<sup>354</sup> In consequence of the grant of the servitude, the club was informed in 2001 that its lease of the relevant part of the foreshore would not be renewed.<sup>355</sup> The club challenged the grant of the servitude in terms of PAJA on the ground of procedural unfairness in the High Court.<sup>356</sup> Hartzenberg J rejected the challenge and found “that because the decision of the Premier was to give effect to a contractual obligation owed by the first respondent to the second respondent, the Premier's decision did not constitute administrative action and was not reviewable under the Act.”<sup>357</sup>

---

<sup>349</sup> The judge's original Afrikaans formulation reads: “[D]ie besteding van openbare gelde in die openbare belang deur 'n openbare liggaam”: *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere* 1997 2 All SA 548 (SCA) at 552.

<sup>350</sup> 2001 1 SA 853 (SCA) at 870 per Schutz JA for the court (“public money was being spent by a public body in the public interest”). See par 3.4.3 below for further discussion of public interest in the form of public funds as relevant factor in these two cases.

<sup>351</sup> 2004 5 SA 262 (SCA).

<sup>352</sup> *Bullock NO v Provincial Government, North West Province* 2004 5 SA 262 (SCA) at par 5.

<sup>353</sup> *Bullock NO v Provincial Government, North West Province* 2004 5 SA 262 (SCA) at par 5.

<sup>354</sup> *Bullock NO v Provincial Government, North West Province* 2004 5 SA 262 (SCA) at par 3.

<sup>355</sup> *Bullock NO v Provincial Government, North West Province* 2004 5 SA 262 (SCA) at par 5.

<sup>356</sup> *Bullock NO v Provincial Government, North West Province* 2004 5 SA 262 (SCA) at par 6.

<sup>357</sup> *Bullock NO v Provincial Government, North West Province* 2004 5 SA 262 (SCA) at par 6.

The club subsequently appealed to the Supreme Court of Appeal.<sup>358</sup> In response to Hartzenberg J's ruling, Cloete JA stated:

I emphatically disagree. The North West Province is landlocked. So is the adjacent province of Gauteng, the most populous province of South Africa, which has the Hartebeestpoort Dam close to its western border. The dam is a valuable recreational resource available to the public at large. Ownership of the foreshore is vested in an organ of State, the first respondent. A decision by the first respondent to grant, in perpetuity, a right over a part of the foreshore to one property owner to the exclusion of all other persons, significantly curtails access to that resource by the public. In my view, for the reasons which follow, the decision to grant the servitude can and must be classified as administrative action and therefore liable to be set aside by a court at the suit of a person who has the standing to claim such relief ... If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made ... There is no reason why the same does not apply to a decision by an organ of State which is performing a function which affects the public interest and which cannot be categorised as a policy decision.<sup>359</sup>

Cloete JA consequently set the decision of the Premier to grant the servitude aside as unjustifiable and for lack of procedural fairness in terms of section 33 of the Constitution.<sup>360</sup> From the extracts quoted above, it is clear that public

---

<sup>358</sup> *Bullock NO v Provincial Government, North West Province* 2004 5 SA 262 (SCA) at par 6.

<sup>359</sup> *Bullock NO v Provincial Government, North West Province* 2004 5 SA 262 (SCA) at par 14, 16. Cf the judgement in *R (on the application of Beer) v Hampshire Farmers Market Ltd* [2004] WLR 233 where the court found that a refusal to allow a person to participate in a farmers' market was subject to public law regulation by means of judicial review partly because "the power was being exercised in order to control the right of access to a public market"; see Bailey 2007 *Public Law* 444 at 454.

<sup>360</sup> *Bullock NO v Provincial Government, North West Province* 2004 5 SA 262 (SCA) at par 24.

interest played a pivotal role in subjecting the state action under scrutiny to administrative law regulation.<sup>361</sup>

### 3.4.3 Public interest in spending public funds

In a number of recent judgements dealing with the conclusion of tenders by organs of state, South African courts have pointed to the expenditure of public funds as a relevant factor in classifying such action as administrative and hence subject to public law regulation.<sup>362</sup> The relevance of public funds in these cases amounts to a specific manifestation of the public interest. In *Umfoloji Transport (Edms) Bpk v Minister van Vervoer en Andere*<sup>363</sup> Howie JA simply rejected the contention that the adjudication of tenders by the State Tender Board did not attract rules of administrative law and stated:

Wat kontraksluiting hier voorafgegaan het, behels suiwer administratiewe handelinge en beslissings aan die kant van die betrokke amptenary ... en boonop in 'n sfeer wat met die besteding van openbare gelde in die openbare belang deur 'n openbare liggaam te doen het.<sup>364</sup>

---

<sup>361</sup> See also *Masetlha v President of the Republic of South Africa and Another* 2007 JOL 19069 (T) where the President's unilateral amendment of the Director-General of the National Intelligence Agency's contract of employment, effectively amounting to the latter's dismissal, was at issue. Du Plessis J concluded that "[i]t would be unrealistic to approach the present issues as if they were matters of private law of contract" and in particular noted the public interest dimension underlying both the contract and the President's relevant actions. It was this public interest dimension that largely motivated the judge to assess the President's actions against public law rules. The judge found that the President's dismissal of the Director-General was lawful, despite the absence of any express statutory or contractual power for such action, on public interest grounds. To this effect the judge stated: "It is not only in the interest of the President that he must be able to trust the head of the Agency, but also in the interest of the public that both the President and the head of the Agency serve."

<sup>362</sup> *Umfoloji Transport (Edms) Bpk v Minister van Vervoer en Andere* 1997 2 All SA 548 (SCA); *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA).

<sup>363</sup> 1997 2 All SA 548 (SCA) at 552 – 553.

<sup>364</sup> *Umfoloji Transport (Edms) Bpk v Minister van Vervoer en Andere* 1997 2 All SA 548 (SCA) at 552 – 553 (What preceded the conclusion of the contract in this case involved purely administrative action and decisions on the part of the relevant authority and that in a sphere

In the subsequent judgement of *Transnet Ltd v Goodman Brothers (Pty) Ltd*<sup>365</sup> the expenditure of public funds was expressly highlighted as relevant in classifying the action as subject to public law regulation. Olivier JA (in a concurring opinion) rejected Transnet's argument in that case that by adjudicating tenders "it acted in a private, commercial capacity and took part in ordinary contractual activities, to which the Constitution does not apply,"<sup>366</sup> stating: "Public funds and eventually State responsibility are involved."<sup>367</sup> While public funds as a factor was expressly linked to the public interest and actions of public bodies in *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere*,<sup>368</sup> Olivier JA used public funds as a freestanding criterion in *Transnet Ltd v Goodman Brothers (Pty) Ltd*.<sup>369</sup> Such use may be problematic if one keeps in mind that not only organs of state spend public money. Many private parties are funded from the public purse in a large

---

that entails the spending of public money by a public body in the public interest (my translation)).

<sup>365</sup> 2001 1 SA 853 (SCA). For a detail discussion of this case see par 3.5.4 below.

<sup>366</sup> *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) at 861.

<sup>367</sup> *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) at 867, see also the majority judgement of Schutz JA at 870. The presence of public funds also emerges as a relevant consideration in other related contexts. Examples are references to public funds as a relevant factor in assessing the lawfulness of specific state action in *Diedericks v Minister of Lands* 1964 1 SA 49 (N) at 59; *Commercia Area Industrial Forum and Another v North East Rand Transitional Metropolitan Council and Another* 1997 3 SA 1075 (T) at 1078; *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others* 1999 1 SA 324 (CKH) at 360 and *Logbro Properties CC v Bedderson* NO 2003 2 SA 460 (SCA) at par 19 – 20; the citation of public funding of universities to doubt the correctness of *Sibanyoni and Others v University of Fort Hare* 1985 1 SA 19 (CK) and *Mkhize v Rector, University of Zululand and Another* 1986 1 SA 901 (D) in *Modise and Others v Steve's Spar, Blackheath* 2001 2 SA 406 (LAC) at 415; and the references to public funding to distinguish the Land Bank from other "commercial concerns" in *Strydom v Die Land- en Landboubank van Suid-Afrika* 1972 1 SA 801 (A) at 814 – 815; *Land and Agricultural Bank of SA v Sentraal Westelike Koöperatiewe Maatskappy Bpk en Andere* 1979 2 SA 346 (N) at 349 and *Ixopo Irrigation Board v Land and Agricultural Bank of South Africa* 1991 3 SA 233 (N) at 237 – 238.

<sup>368</sup> 1997 2 All SA 548 (SCA) at 552.

<sup>369</sup> 2001 1 SA 853 (SCA) at 867. However, the majority opinion of Schutz JA follows Howie JA's approach in *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere* 1997 2 All SA 548 (SCA).

variety of forms, for example grants, incentive schemes, subsidies and tax rebates. However, it would be unrealistic to subject such action to public law regulation simply because of the use of public funds. Such action may be in every other respect truly private (commercial) activity, undertaken by the particular private party for its own sole gain. The large variety of public funding of private parties increases the unrealistic nature of public law regulation in such instances. Surely a large privately owned corporation with a multi-million rand annual turnover that receives a small amount of public funding cannot be equated with an organ of state whose entire budget consists of public funds simply based on the common presence of public funding? This raises the question of the level of public funding at which public law regulation should kick in. No principled answer can be given to this question.

Baxter also refers to public funds as a relevant factor in regulating state commercial activity.<sup>370</sup> However, like other commentators,<sup>371</sup> Baxter points out that the expenditure of public funds in fact negates the classification of state commercial activity as either subject to public law regulation or private law regulation.<sup>372</sup> If the use of public funds was a determinative criterion in classifying the particular action as subject to public law regulation, then *all* state commercial activity would be so subject to public law regulation, since surely the state has no other assets than public assets to use. This criticism can also be extended to public interest as classification criterion more generally.

#### **3.4.4 Private state interest as opposite of public interest?**

The *Interessentheorie* has been criticised on the basis that all legal rules are arguably aimed at the public interest at some level.<sup>373</sup> Even if such interest

---

<sup>370</sup> Baxter *Administrative Law* 396. See also Bailey 2007 *Public Law* 444 at 451.

<sup>371</sup> See Pretorius (2002) 119 *SALJ* 374 at 395.

<sup>372</sup> Baxter *Administrative Law* 396.

<sup>373</sup> Ehlers in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 123; Floyd *Die Owerheidsooreenkoms – 'n Administratiefregtelike Ondersoek* 78; Szladits in David (ed) *International Encyclopedia of Comparative Law Volume II The Legal Systems of the World*

simply exists in the orderly functioning of society, it remains that all legal rules are in the public interest. This criticism undermines the ability of the *Interessentheorie* to distinguish in any meaningful way between rules of private and public law. Similar criticism can be raised against the use of public interest as a criterion in the current classification approach to regulating state commercial activity.

If public interest is to demarcate state action subject to public law regulation from state action subject to private law regulation, it follows that there must be private interests the state may pursue in the latter category of instances. However, it is arguable that the state must *always* act in the public interest. In fact, it has been called a *duty* of all public bodies to act in the public interest, whatever such action may be.<sup>374</sup> In South African law there seems to be consensus amongst academic commentators that such a duty in fact rests on the state or at the very least that the purpose of all administrative action is in general the advancement of public interest.<sup>375</sup> If one accepts this argument, then public interest cannot assist in classifying state action, since it will always be present.

---

*Their Comparison and Unification* par 36; Singh *German Administrative Law in Common Law Perspective* 8.

<sup>374</sup> Baxter *Administrative Law* 100, 411; Boule, Harris & Hoexter *Constitutional and Administrative Law* 300; Arrowsmith *Civil Liability and Public Authorities* 4, (1990) 106 LQR 277 at 283; Bailey 2007 *Public Law* 444 at 451. In German law both the *Bundesverfassungsgericht* and *Bundesgerichtshof* have held that public interest is a prerequisite for state commercial activity, which is also now statutorily required; see Ress (1980) 29 *International and Comparative Law Quarterly* 87 at 91 – 92, 97 – 98. See also Singh *German Administrative Law in Common Law Perspective* 104 (“[A]dministrative activities even in the private law form are part of public administration which serves the common interests of the community”); Ehlers in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 19 *et seq.*, 155. Mewett (1958) 5 *McGill LJ* 222 at 223 notes in the context of French law that “it is difficult to envisage how the administration, as such, can have any interests of its own.”

<sup>375</sup> Baxter *Administrative Law* 100, 411; Boule, Harris & Hoexter *Constitutional and Administrative Law* 300; Wiechers *Administratiefreg* 258, in Strauss (ed) *Huldigingsbundel vir WA Joubert* 281; Hoexter *Administrative Law in South Africa* 42, 276; Burns & Beukes *Administrative Law under the 1996 Constitution* 176, 364; Plasket in Glover (ed) *Essays in Honour of AJ Kerr* 160; Van Dorsten (1985) 48 *THRHR* 381 at 388.

In English law Dawn Oliver in particular has noted a change in judicial attitude towards the recognition of private state interests.<sup>376</sup> She quotes the following remarks of Laws J in *R v Somerset County Council, ex parte Fewings and others*<sup>377</sup> as indicative of this change:

Public bodies and private persons are both subject to the rule of law; nothing could be more elementary. But the principles which govern their relationships with the law are wholly different. For private persons, the rule is that you may do anything you choose which the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in the law books ... But for public bodies the rule is opposite, and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake; at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose.

Although this development in English law is only evident in relation to local authorities that are statutory bodies with limited, circumscribed powers, Oliver argues that it can be viewed in a more general light as:

[A] movement in the law towards the position that public bodies do not have interests of their own or residual, unreviewable freedoms and must justify their actions in terms of the public interest, not their own interests.<sup>378</sup>

---

<sup>376</sup> Oliver in Taggart (ed) *The Province of Administrative Law* 228 – 229.

<sup>377</sup> [1995] 1 All ER 513 at 524.

<sup>378</sup> Oliver in Taggart (ed) *The Province of Administrative Law* 228 – 229 (footnotes omitted). See also Wade & Forsyth *Administrative Law* 233 (“Public authorities have a duty...to exercise their powers as the public interest requires”), 355 (“The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good”); Arrowsmith (1990) 106 *LQR* 277 at 283, 288, 291; Alder (1993) 13 *Legal Studies* 183 at 191; Arrowsmith *Civil Liability and Public Authorities* 4; *Jones v Swansea City Council* [1989] 3 All ER 162 at 175 (per Slade LJ: “All



It is apparent that public interest cannot function as a classification criterion of state action under such a development.

In South African law Daniel Malan Pretorius argues that there may be a limited number of instances where a public body concludes a contract which is “not aimed at achieving a public purpose or promoting the public interest.”<sup>379</sup> He submits that contracts for cleaning materials to be used in a public body’s offices, or for tea and coffee to be consumed by staff may be examples of such instances, since these would not be directly aimed at a public interest, but rather for the public body’s own direct benefit only.<sup>380</sup>

The opposite view has recently been put forward by Plasket J in *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others*.<sup>381</sup> There the judge stated in the context of public employment that “[t]here are good reasons why public authorities are treated differently by the law to private individuals” and then quoted with approval the remarks of Laws J in *R v Somerset County Council, ex parte Fewings and Others*,<sup>382</sup> quoted above, to the effect that all action by public bodies must be in the public interest.<sup>383</sup> In a similar vein Howie P recently declared in a commercial

---

powers possessed by a local authority, whether conferred by statute or by contract, are possessed ‘solely in order that it may use them for the public good’.”)

<sup>379</sup> Pretorius (2002) 119 SALJ 374 at 387.

<sup>380</sup> Pretorius (2002) 119 SALJ 374 at 396. It should be noted that Pretorius is dealing in this passage with both public function and public interest as relevant factors, which he seems to use more or less interchangeably, but which are treated as separate criteria here. Cf Baxter *Administrative Law* 100 note 51 describing “a duty to act in the public interest” as “a duty to advance the general interest of the community, *directly or indirectly*” (my emphasis). Certainly, the examples given by Pretorius can all be said to at least advance the interest of the community indirectly. I shall return to these examples and argument of Pretorius in par 3.5.6 below. Nestadt J’s remarks in *Oertel and Others NNO v Director of Local Government and Others* 1981 4 SA 491 (T) at 501, quoted at note 342 above, may also be read as suggesting the existence of a private state interest.

<sup>381</sup> 2006 2 All SA 175 (E) at par 56 note 59.

<sup>382</sup> [1995] 1 All ER 513 at 524.

<sup>383</sup> See also *Vumazonke v MEC for Social Development, Eastern Cape, and Three Similar Cases* 2005 6 SA 229 (SE) at par 35; *Stanfield v Minister of Correctional Services and Others*

context for a unanimous Supreme Court of Appeal that organs of state operate in the interest of the public.<sup>384</sup>

It is submitted that Pretorius's distinction between public interest actions of an organ of state and actions taken for the state's "own direct benefit only"<sup>385</sup> cannot be supported.<sup>386</sup> Ultimately, all state actions are taken in the public interest, however general that interest may be. Consequently, one cannot rely on public interest as a criterion to distinguish certain types of state action from others since no private state interests exist. This is not to say that public interest is not an important consideration in the regulation of state commercial activity. It may, at the most basic level, be the reason why state commercial action is subjected to public law regulation in contrast to analogous private commercial action. The presence of public interest may also be relevant, even dispositive, in subjecting private action to public regulation.<sup>387</sup> Public interest may therefore be a useful factor in explaining the public regulation of commercial action, but not as a criterion in the classification approach to state commercial activity.

### 3.5 Criterion 5: Fulfilling a public function

A criterion that is closely aligned to that of public interest is public function. The link exists in a generalised definition of public function as those functions aimed at the public interest. In this definition public function becomes simply

---

2004 4 SA 43 (C) at par 131; *Nextcom (Pty) Ltd v Funde NO and Others* 2000 4 SA 491 (T) at 504; *Southern Metropolitan Substructure v Thompson and Others* 1997 2 SA 799 (W) at 803.

<sup>384</sup> *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 4 BCLR 473 (SCA) at par 55.

<sup>385</sup> To use of the words of Nestadt J in *Oertel and Others NNO v Director of Local Government and Others* 1981 4 SA 491 (T) at 501.

<sup>386</sup> Also cf Mitchell *The Contracts of Public Authorities* 226 where the failure of similar distinctions in France and the United States is discussed.

<sup>387</sup> See Goldstone J's judgement in *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983 3 SA 344 (W) at 360 – 365 where the presence of public interest played an important role in subjecting the otherwise private JSE to public regulation. See also Baxter *Administrative Law* 100.

one way of expressing action taken in the public interest.<sup>388</sup> However, there are important differences between public interest and public function as classification criteria, which necessitates separate treatment of these criteria. The most fundamental difference lies in the fact that under the criterion of public interest the focus is more on the (abstract) interest the public has in the action, whereas under public function the focus is rather on the object or subject matter of such action.<sup>389</sup>

### 3.5.1 *Service public* in French law

In French law a similar criterion is used under the label public service (*service public*).<sup>390</sup> Although this criterion is not precisely defined in French law,<sup>391</sup> leading writers have described it as “any activity of a public authority aimed at satisfying a public need.”<sup>392</sup> Early case law has described public service as:

Everything concerning the organisation and functioning of the public service, whether the administration acted by contract or

---

<sup>388</sup> Cf Pretorius (2002) 119 *SALJ* 374 at 387, 396; *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* 2006 2 All SA 175 (E) at par 53 “[W]hat makes the power involved a public power is the fact that it has been vested in a public functionary who is required to exercise it in the public interest...”

<sup>389</sup> I am not suggesting, however, that the distinction between these two criteria is in any way watertight. In fact, I agree that cases of public function can also be translated to public interest since it would be difficult, if indeed possible, to divorce actions with a public function character from a public interest purpose, especially if one accepts that all state actions are taken in the public interest. Ultimately, these two ideas may simply be two different ways of looking at the same criterion.

<sup>390</sup> Brown & Bell *French Administrative Law* 129, 141 – 142; Nicholas *The French Law of Contract* 26; Szladits in David (ed) *International Encyclopedia of Comparative Law Volume II The Legal Systems of the World Their Comparison and Unification* par 39, 69; Baxter *Administrative Law* 62; Arnould (2001) 10 *Public Procurement LR* 324 at 335; Martin (1997) 6 *Public Procurement LR* CS166.

<sup>391</sup> Brown & Bell *French Administrative Law* 134; Szladits in David (ed) *International Encyclopedia of Comparative Law Volume II The Legal Systems of the World Their Comparison and Unification* par 39.

<sup>392</sup> Brown & Bell *French Administrative Law* 130; Szladits in David (ed) *International Encyclopedia of Comparative Law Volume II The Legal Systems of the World Their Comparison and Unification* par 39.

by unilateral authority, is an administrative activity and consequently within the administrative competence.<sup>393</sup>

In the context of contractual relationships the case of *Bertin*<sup>394</sup> held that, where the private party to the contract is closely associated with meeting a particular public need or the private party entirely performs the action meeting the public need, such contract would be subject to administrative law regulation.<sup>395</sup> In that case a government department contracted with a private party to supply the materials and provide the catering at a centre run by the department.<sup>396</sup> Such contract was held to be subject to administrative law since the private party met the complete public need.<sup>397</sup> However, the contract would have been subject to private law if the private party had only supplied the materials and not also provided the service.<sup>398</sup> This “modern analysis of the criterion of public service”<sup>399</sup> illustrates the strict nature of the criterion. Public function will thus only in very specific instances act as a freestanding criterion to classify state commercial activity in French law as subject to public law regulation.

### 3.5.2 Public purpose of state commercial action

South African courts have pointed to the presence or absence of a public function in various forms indicating that the action under scrutiny should be subjected to public or private law regulation respectively.<sup>400</sup> One such form

---

<sup>393</sup> Szladits in David (ed) *International Encyclopedia of Comparative Law Volume II The Legal Systems of the World Their Comparison and Unification* par 39 referring to the case of *Terrier* in the *Conseil d'Etat*, 6 February 1903.

<sup>394</sup> *Conseil d'Etat*, 20 April 1956.

<sup>395</sup> Brown & Bell *French Administrative Law* 142; Nicholas *The French Law of Contract* 26.

<sup>396</sup> Brown & Bell *French Administrative Law* 142; Nicholas *The French Law of Contract* 26.

<sup>397</sup> Brown & Bell *French Administrative Law* 142; Nicholas *The French Law of Contract* 26.

<sup>398</sup> Brown & Bell *French Administrative Law* 142; Nicholas *The French Law of Contract* 26.

<sup>399</sup> Brown & Bell *French Administrative Law* 142.

<sup>400</sup> A similar development has been noted in English law following the well-known judgement in *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815. Hunt in Taggart (ed) *The Province of Administrative Law* 28 – 29 describes this move as follows: “The significance of the *Datafin* decision is that it marked an important shift away from a source of

that has emerged from a number of judgements is the public purpose of the action taken.

An example of the relevance of purpose is the remarks of Nestadt J in *Oertel and Others NNO v Director of Local Government and Others*.<sup>401</sup> There the judge stated with reference to the limited application of the rules of prescription against the state:

The limitations apply where the right or property in question is respectively exercised or set aside for the benefit of the public as opposed to the case where the State engages in commercial enterprises and acts as an ordinary creditor for its own direct benefit only.

Although these remarks may be interpreted to refer to public interest as classification criterion,<sup>402</sup> they can also be read to point to the public purpose of the action classifying such action as a public function and hence subject to public law regulation.

Another example of the purpose of the action motivating a court to subject the action to public law rules is to be found in *Opperman v Uitvoerende Komitee van die Verteenwoordigende Owerheid van die Blankes en Andere*.<sup>403</sup> In that case the applicant obtained a loan from the state for the purpose of purchasing a farm.<sup>404</sup> In granting the loan the state acted in terms of various statutory provisions, the purpose of which were *inter alia* the promotion of farming activities as well as increasing the population density in the relevant area.<sup>405</sup> The loan was consequently made subject to a number of

---

the power approach to the province of public law towards an approach based on the nature of the function being exercised ... It was clear from the reasoning in *Datafin* that the thrust of the decision was to move from a 'source of the power' test for reviewability to a 'nature of the function' test."

<sup>401</sup> 1981 4 SA 491 (T) at 501. See the discussion of this case at par 3.4.1 above.

<sup>402</sup> See par 3.4.1 and note 380 above.

<sup>403</sup> 1991 1 SA 372 (SWA).

<sup>404</sup> *Opperman v Uitvoerende Komitee van die Verteenwoordigende Owerheid van die Blankes en Andere* 1991 1 SA 372 (SWA) at 375.

<sup>405</sup> *Opperman v Uitvoerende Komitee van die Verteenwoordigende Owerheid van die Blankes en Andere* 1991 1 SA 372 (SWA) at 375, 377.

conditions furthering these goals, one of which was a prohibition to dispose of the property within 10 years without state permission.<sup>406</sup> Within 10 years after the purchase, the applicant wanted to sell the farm and sought the permission of the state in terms of the conditions imposed under the loan and registered against the title deed.<sup>407</sup> When such permission was refused, the applicant brought an action challenging this refusal.<sup>408</sup> One of the arguments of the state in opposing the application was that the relationship between the applicant and the state was one of contract and that the refusal of the consent was consequently not open to review on public law grounds.<sup>409</sup> For this argument the state relied on *Mustapha and Another v Receiver of Revenue, Lichtenburg, and Others*.<sup>410</sup> In answer to this argument, Strydom J stated:

Om in hierdie geval te sê dat die regte en bevoegdhede van die applikant en die eerste respondent suiwer kontraktueel is, is na my mening nie korrek nie ... Die oplegging van die tienjaarklousule ... hou verband met die doelstellings van Wet 28 van 1966 sowel as wat beoog word met die bepalings van Wet 18 van 1979 en, na my mening, volg dit dat 'n opheffing of 'n skraping van hierdie verbod met sodanige doelstellings rekening sal hou. Dit is dus hier nie 'n geval van willekeurige wilsuitoefening deur die beampte of liggaam wat sodanige aansoek moet oorweeg nie. Hierdie saak kan dus nouliks gelyk gestel word met die *Mustafa*-saak *supra* ... Bygevolg is ek van mening dat die beslissing deur die tweede respondent gegee wel hersienbaar is.<sup>411</sup>

<sup>406</sup> *Opperman v Uitvoerende Komitee van die Verteenwoordigende Owerheid van die Blankes en Andere* 1991 1 SA 372 (SWA) at 375.

<sup>407</sup> *Opperman v Uitvoerende Komitee van die Verteenwoordigende Owerheid van die Blankes en Andere* 1991 1 SA 372 (SWA) at 376.

<sup>408</sup> *Opperman v Uitvoerende Komitee van die Verteenwoordigende Owerheid van die Blankes en Andere* 1991 1 SA 372 (SWA) at 376.

<sup>409</sup> *Opperman v Uitvoerende Komitee van die Verteenwoordigende Owerheid van die Blankes en Andere* 1991 1 SA 372 (SWA) at 379.

<sup>410</sup> 1958 3 SA 343 (A).

<sup>411</sup> *Opperman v Uitvoerende Komitee van die Verteenwoordigende Owerheid van die Blankes en Andere* 1991 1 SA 372 (SWA) at 379 (To say in this case that the rights and powers of the

The public purpose, as expressed in the objectives of the relevant statutes, underlying this transaction clearly motivated the judge to distinguish this loan transaction from an ordinary case of contract and to subject it to public law regulation.

### 3.5.3 Government policy in state commercial activity

Another form of public function has been located in the implementation of government policy.<sup>412</sup> In the context of commercial activity this form of public function played a pivotal role in classifying state actions as subject to public law regulation in *Ramburan v Minister of Housing (House of Delegates)*.<sup>413</sup> In that case the applicant entered into lease agreements with an organ of state, the Community Development Board (“the CDB”), in respect of a shop and a flat respectively.<sup>414</sup> These premises were made available to the applicant because of his status as a displaced trader.<sup>415</sup> In about 1991 the state decided to sell all shopping complexes under the control of the CDB and to give preference to incumbent tenants.<sup>416</sup> Due to a number of allegations of

---

applicant and first respondent are purely contractual, is in my view not correct ... Imposing the ten-year clause is related to the purposes of Act 28 of 1966 as well as those of Act 18 of 1979 and, in my view, it follows that a revocation or cancellation of the prohibition must take account of those purposes. It is therefore not a case of an exercise of free discretion by the official or body considering such application. This case can hardly be equated with the *Mustapha* case ... Consequently, I am of the opinion that the decision by the second respondent is reviewable (my translation)).

<sup>412</sup> Pretorius (2002) 119 SALJ 374 at 387. In English law it has also been argued that the presence of government policy may convert a normally private law matter, like a decision to sell land, into a public law one; see Bailey 2007 *Public Law* 444 at 449: “Normally, such a decision [to sell land] is a private law matter, the local authority acting as landowner, unless a public law element is introduced by some additional factor. Such an element would be present ‘if the authority has a policy which relates to the retention or disposal of certain types of land’ ...”, with reference to *R v Bolsover DC Ex p. Pepper* [2001] BLGR 43 and *R (on the application of Molinaro) v Kensington RLBC* [2001] EWHC Admin 896.

<sup>413</sup> 1995 1 SA 353 (D).

<sup>414</sup> *Ramburan v Minister of Housing (House of Delegates)* 1995 1 SA 353 (D) at 356.

<sup>415</sup> *Ramburan v Minister of Housing (House of Delegates)* 1995 1 SA 353 (D) at 356.

<sup>416</sup> *Ramburan v Minister of Housing (House of Delegates)* 1995 1 SA 353 (D) at 358.

fraud made against the applicant, the state decided to sell the shop and flat leased by the applicant to the only other tenant in the particular building.<sup>417</sup> As a result the respective agreements of lease with the applicant were terminated upon the terms of such agreements and giving the requisite periods of notice.<sup>418</sup> The applicant challenged the termination of the agreements in the High Court on the ground of procedural unfairness.<sup>419</sup> The respondents argued that public law rules did not apply since “the decisions were of a purely commercial nature and amounted to no more than the exercise of contractual rights to cancel the agreements.”<sup>420</sup> In rejecting this argument, McLaren J stated:

It is clear from the evidence that the CDB was at all material times, in its dealings with the applicant, implementing government policy. These dealings culminated in the allocation to the applicant of the shop and the flat. The applicant had no choice in the matter, except to refuse the allocation to him of the shop. Furthermore, the applicant was simply advised of the rental and the other terms of the agreements. In my view the evidence establishes that, at all material times, the applicant had every reason to believe that, if the CDB decided to sell the shop and the flat, he would be afforded an opportunity to buy them. Any sale of an immovable property by the CDB could, in terms of s 15(2)(b)(iii), only be effected for the purpose of achieving the objects of the CDB. In this sense such a sale would amount to a step in the implementation of the government policy ... It is clear that the Board of the fifth respondent only has the power to sell and let immovable property for the purpose of achieving its objects and that, at all relevant times, it was implementing government policy. In my view, the decisions by the Board to sell the property constituted steps in the implementation of

---

<sup>417</sup> *Ramburan v Minister of Housing (House of Delegates)* 1995 1 SA 353 (D) at 359 – 360.

<sup>418</sup> *Ramburan v Minister of Housing (House of Delegates)* 1995 1 SA 353 (D) at 359.

<sup>419</sup> *Ramburan v Minister of Housing (House of Delegates)* 1995 1 SA 353 (D) at 360.

<sup>420</sup> *Ramburan v Minister of Housing (House of Delegates)* 1995 1 SA 353 (D) at 360 – 361.



government policy which, at that time, embraced the concept of 'privatisation', ie the disposal of assets owned by the State.<sup>421</sup>

As a result the judge found the termination of the leases subject to public law regulation.

From these passages a number of criteria emerge that seem to influence the judge's conclusion that the action was not simply a commercial matter subject only to private law regulation. The source of the power exercised, the superior power or authority of the state as well as the public purpose served by the relevant actions were all noted. However, the ultimate factor that seems to inform the classification is that the actions amounted to the implementation of government policy. The other factors are listed in support of this decisive criterion.<sup>422</sup>

#### **3.5.4 Content of the action pointing to a public function**

The content or subject matter of the action under scrutiny may also indicate the presence of a public function and hence public law regulation. This is effectively illustrated by the judgement of the Supreme Court of Appeal in *Transnet Ltd v Goodman Brothers (Pty) Ltd*.<sup>423</sup> In that case Transnet called for tenders in 1997 for the supply of gold watches, which it was in the custom of awarding to its long-serving employees.<sup>424</sup> Goodman Brothers, who had been supplying Transnet with such watches on tender for four years, again submitted a tender.<sup>425</sup> However, the tender was awarded to another tenderer.<sup>426</sup> Goodman Brothers subsequently requested reasons from Transnet why its tender had not been accepted along with a number of documents relating to the tender process.<sup>427</sup> In this request Goodman

---

<sup>421</sup> *Ramburan v Minister of Housing (House of Delegates)* 1995 1 SA 353 (D) at 361, 362.

<sup>422</sup> See *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC 2001 3 SA 1013 (SCA) at par 15; Hoexter (2004) 121 SALJ 595 at 607, 609.

<sup>423</sup> 2001 1 SA 853 (SCA).

<sup>424</sup> *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) at 857.

<sup>425</sup> *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) at 857 – 858.

<sup>426</sup> *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) at 858.

<sup>427</sup> *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) at 858.

Brothers relied on the administrative justice rights in section 33 of the Constitution.<sup>428</sup> Transnet refused to supply any reasons or documentation stating that it was against its policy to supply such reasons and that the conditions of tender expressly exempted Transnet from supplying reasons for non-award.<sup>429</sup> Goodman Brothers consequently brought an application in the High Court claiming reasons for the non-award of the tender as well as a large number of documents relating to the tender process.<sup>430</sup> The High Court gave an order directing Transnet to supply Goodman Brothers with reasons for rejecting its tender, but rejected Goodman Brothers' claim for access to the documents sought.<sup>431</sup> On appeal, Transnet argued that "it acted in a private, commercial capacity and took part in ordinary contractual activities, to which the Constitution does not apply..."<sup>432</sup> The court disagreed with this argument. Schutz JA (for the court) noted the ruling in *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere*,<sup>433</sup> which held that the adjudication of a tender by an organ of state constituted administrative action.<sup>434</sup> The judge was of the opinion that the same considerations applied to Transnet.<sup>435</sup> He continued:

I do not think that anything can be made of the fact that Transnet is now a limited company. The government still owns all the shares in it and thus has ultimate control. It still provides a general service to the public, even though it is now competition- and profit-orientated. It still has a near-monopoly over rail transport.

Already apparent is the relevance of the public function fulfilled by Transnet. In reaction to an argument by Transnet based on *President of the Republic of*

---

<sup>428</sup> *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) at 858.

<sup>429</sup> *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) at 858 – 859.

<sup>430</sup> *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) at 859.

<sup>431</sup> *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) at 860.

<sup>432</sup> *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) at 861.

<sup>433</sup> 1997 2 All SA 548 (SCA).

<sup>434</sup> *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) at 870.

<sup>435</sup> *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) at 870.

*South Africa and Others v South African Rugby Football Union and Others*<sup>436</sup>

that while some of its actions amounted to administrative action, others did not, Schutz JA said the following:

Thus, so proceeded the argument, when Transnet invites tenders for the supply of locomotives, it acts administratively. But when it invites tenders for toilet paper or, as in this case, gold watches, it does not. I fail to see how such a distinction is to be drawn, particularly where, as in this case, the purchase of watches is clearly incidental to the exercise of Transnet's general powers. The gold watches are bought so that they may be used to secure the loyalty of employees, much as salaries are paid to secure their services. For the reasons given I am of the view that the actions of Transnet in calling for and adjudicating tenders constituted administrative action, whatever contractual arrangements may have been attendant upon it.<sup>437</sup>

From these two passages emerges Schutz JA's classification of Transnet's actions as subject to public law regulation based on the content of such action. He viewed the acquisition of the watches as linked to Transnet's public service and hence also a public function. It is noteworthy that Schutz JA reached this conclusion despite his express recognition of the commercial nature or private market orientation of Transnet's activities. It indicates that public function is indeed a strong criterion in classifying state action as subject to public law regulation, despite an ostensibly private commercial setting.

---

<sup>436</sup> 2000 1 SA 1 (CC).

<sup>437</sup> *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) at 870 – 871. See also *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 21 where Moseneke DCJ declared: “[A]lthough an invitation to tender and its acceptance may be susceptible to common-law rules of contract, when a tender board evaluates and awards a tender, it acts within the domain of administrative law. Its decision in awarding or refusing a tender constitutes an administrative action. That is so because the decision is taken by an organ of State which wields public power or performs a public function in terms of the Constitution or legislation and the decision materially and directly affects the legal interests or rights of tenderers concerned” (footnotes omitted).

In a concurring opinion Olivier JA also highlighted the public function of Transnet's actions as of importance in subjecting such action to public law regulation. He asserted that the status of Transnet as an organ of state is of lesser importance and that "the threshold requirement is that it exercised a public power or performed a public function."<sup>438</sup> In applying this requirement to the present instance, Olivier JA found that Transnet merely stepped into the shoes of the former government department, the South African Transport Services, in exercising a public function, viz the public transport service.<sup>439</sup> The result, according to the judge, was that Transnet was generally subject to public law regulation.<sup>440</sup> Olivier JA was furthermore of the opinion that the tender process under scrutiny was directly related to Transnet's general public function as identified by the judge and consequently also amounted to administrative action.<sup>441</sup> The identification of the public transport service as the function fulfilled by Transnet in classifying Transnet's actions in this judgement clearly illustrates that the content of the function at stake may point to the public nature of such function.

Of further interest is Olivier JA's equation of a *public* function with a *governmental* function.<sup>442</sup> The focus in defining a public function here is somewhat different than in the French approach of *service public*. There the

---

<sup>438</sup> *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) at 866.

<sup>439</sup> *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) at 866.

<sup>440</sup> *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) at 866.

<sup>441</sup> *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) at 866. The other factors that influenced this conclusion were the statutory source of the powers exercised as well as the expenditure of public funds, see par 3.4.3 above.

<sup>442</sup> *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) at 864. In English law there is some authority for arguing that a distinction should be made between public function or interest and government function or interest in the classification of action for purposes of subjecting such action to public law judicial regulation; see *R v Chief Rabbi of the United Congregations of Great Britain and the Commonwealth, ex parte Wachmann* [1993] 2 All ER 249 at 254 (per Simon Brown J: "To attract the court's supervisory jurisdiction there must be not merely a public but potentially a governmental interest in the decision-making power in question"); Craig in Taggart (ed) *The Province of Administrative Law* 205; Hunt in Taggart (ed) *The Province of Administrative Law* 31; Pannick 1992 *Public Law* 1 at 5; Alder (1993) 13 *Legal Studies* 183 at 194.

need of the public is paramount,<sup>443</sup> whereas here the function of government is highlighted. The French approach is preferable since in Baxter's words "what is 'governmental' will vary according to changing political conceptions of the role of the state."<sup>444</sup> However, if the French criterion of *service public* was applied in this case, the outcome would probably have been quite different. The link between fulfilling the public need, in this case providing public transport, and the action undertaken by the private contractor, in this case supplying Transnet with gold watches, would certainly not have been sufficiently close for French law to classify Transnet's tender actions as subject to public law regulation. This is an important point to which I shall return below.<sup>445</sup>

Despite the strong reliance on content as indicating the public function of Transnet in *Transnet Ltd v Goodman Brothers (Pty) Ltd*,<sup>446</sup> even trumping the commercial nature of both the specific action under scrutiny and the general context of Transnet's activities in that case, content was curiously rejected in classifying the actions of an organ of state in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC*.<sup>447</sup> The court *a quo* in that matter expressly pointed to the content of the agreement under scrutiny, viz the outsourcing of public functions to a private contractor, as an important consideration in concluding that the termination of that agreement by the Cape Metropolitan Council was subject to public law regulation.<sup>448</sup> However, this factor did not move the Supreme Court of Appeal to reach the same

---

<sup>443</sup> See par 3.5.1 above.

<sup>444</sup> Baxter *Administrative Law* 398 note 75.

<sup>445</sup> See par 3.5.6 below.

<sup>446</sup> 2001 1 SA 853 (SCA).

<sup>447</sup> 2001 3 SA 1013 (SCA). See the detailed discussion of this case in par 3.2.4 above.

<sup>448</sup> *Metro Inspection Services (Western Cape) CC and Others v Cape Metropolitan Council* 1999 4 SA 1184 (C) at 1195. See also *Independent Municipal and Allied Trade Union and Others v MEC: Environmental Affairs, Developmental Social Welfare and Health, Northern Cape Province, and Others* 1999 4 SA 267 (NC) at 285 – 286 where, with reliance on the court *a quo*'s judgement in *Metro Inspection Services*, the judge concluded that since the subject matter of the contract at issue, viz the provision of health services, was statutory in nature and hence subject to public law regulation, that contract was also subject to public law regulation as well as actions taken in terms of that contract such as termination thereof.

conclusion on appeal.<sup>449</sup> That court expressly stated that the content of the agreement made little difference in deciding whether the termination of that agreement amounted to administrative action.<sup>450</sup> This aspect of the judgement has been severely criticised.<sup>451</sup> Pretorius rightly argues that subject matter of the contract and consequently also the specific action under scrutiny in this case, viz the termination of the agreement, “was not accorded sufficient weight” by the Supreme Court of Appeal.<sup>452</sup> He argues that this factor should have moved the court to classify the action as subject to public law regulation.<sup>453</sup>

If one applies the French criterion of *service public* to the facts in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC*<sup>454</sup> the outcome would most probably have been different than the one reached in the Supreme Court of Appeal. The complete servicing of the public need by the private contractor in this case meets the requirements set by the French approach for such contract to be subject to public law regulation.<sup>455</sup> The use of public function as criterion in French law thus seems to lead to the completely opposite results from that reached in South African courts. This conclusion raises at least some questions, if not a more critical reaction, about the application of public function as classification criterion in South African law.

### 3.5.5 The functional approach in administrative law

In South African law public function has become an important concept in defining administrative action in recent years. In the leading case of *President*

<sup>449</sup> *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 3 SA 1013 (SCA) at par 13.

<sup>450</sup> *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 3 SA 1013 (SCA) at par 13.

<sup>451</sup> Hoexter (2004) 121 SALJ 595 at 617 – 618; Pretorius (2002) 119 SALJ 374 at 389 – 390. See also Burns *Administrative Law under the 1996 Constitution* 17 – 18.

<sup>452</sup> Pretorius (2002) SALJ 374 at 390.

<sup>453</sup> Pretorius (2002) SALJ 374 at 390.

<sup>454</sup> 2001 3 SA 1013 (SCA).

<sup>455</sup> See Brown & Bell *French Administrative Law* 142.

*of the Republic of South Africa v South African Rugby Football Union*<sup>456</sup> the court said:

In s 33 [of the Constitution] the adjective 'administrative' not 'executive' is used to qualify 'action'. This suggests that the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not ... The focus of the enquiry as to whether conduct is 'administrative action' is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.

This functional approach is also adopted in PAJA's definition of administrative action, the relevant part of which reads:

**“administrative action”** means any decision taken, or any failure to take a decision, by

(a) an organ of state, when—

...

(ii) exercising a public power or *performing a public function* in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when

exercising a public power or *performing a public function* in terms of an empowering provision; ...<sup>457</sup>

It should be kept in mind, however, that the current query is not restricted to the identification of administrative action. The aim of the classification approach currently under discussion is not necessarily to classify state action as administrative in nature, but more generally to ascertain whether public law regulation (in any form) applies to such action in contrast to exclusive private law regulation. One should thus be careful not to extend the reasoning in

---

<sup>456</sup> 2000 1 SA 1 (CC) at par 141.

<sup>457</sup> S 1(i) (my emphasis).

*President of the Republic of South Africa v South African Rugby Football Union*<sup>458</sup> and the provisions of PAJA too far in relation to public function as a classification criterion. The danger of such an approach was already noted by Schutz JA in *Transnet Ltd v Goodman Brothers (Pty) Ltd*,<sup>459</sup> who rejected an attempt to distinguish between different functions of Transnet as subject to private and public law respectively based on the functional approach to administrative action. The judge was of the view that the reasoning in *President of the Republic of South Africa v South African Rugby Football Union*<sup>460</sup> could not be “extrapolated to the procurement activities of Transnet.”<sup>461</sup> In the latter case the classification of the action under scrutiny as not administrative action did not mean that no public law regulation applied. In fact, that case confirmed that all public actions are subject to at least the principle of legality and since the action under scrutiny in that case was undoubtedly public action, such public law regulation applied.<sup>462</sup> This is a far cry from a conclusion that no public law regulation applies since no public function is being fulfilled. Nugent JA captured this limited role of public function effectively when he said in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*:<sup>463</sup>

[A]ll State power ... is subject to inherent constitutional constraint - if only for legality - the extent of which varies according to the nature of the power that is being exercised.

<sup>458</sup> 2000 1 SA 1 (CC) at par 141.

<sup>459</sup> 2001 1 SA 853 (SCA) at 870 – 871.

<sup>460</sup> 2000 1 SA 1 (CC) at par 141.

<sup>461</sup> *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) at 870.

<sup>462</sup> *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) at par 148. See also *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 1 SA 374 (CC) at par 58 where this principle was first recognised by the Constitutional Court as well as the subsequent judgement in *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 2 SA 674 (CC) at par 20, 79, 83, 85; Klaaren (1999) 15 SAJHR 209; Hoexter (2000) 117 SALJ 484 at 505 – 507, (2004) 4 Macquarie LJ 165.

<sup>463</sup> 2005 6 SA 313 (SCA) at par 20 (footnotes omitted).



Public function, as used in PAJA's definition of administrative action and as classification factor in *President of the Republic of South Africa v South African Rugby Football Union*,<sup>464</sup> may thus be an important consideration in the determination of exactly what public law regulation applies to the instant case, but is of lesser importance in classifying state action as either subject to public or private law regulation in the first instance.

### 3.5.6 Causality between action and function

The application of the French criterion of *service public* to the judgements in *Transnet Ltd v Goodman Brothers (Pty) Ltd*<sup>465</sup> and *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC*<sup>466</sup> above,<sup>467</sup> raises an important question regarding causality in the use of public function as classification criterion. The question is how closely linked the action under scrutiny and the averred public function must be in order for such action to be subjected to public law regulation. This same concern underlies related questions, such as whether the action at stake is in *direct* or *indirect* performance of a public function<sup>468</sup> and arguably even in questions relating to the distinction between *internal* and *external* purposes of state action.<sup>469</sup> In French law the link must be very close for the action to be subject to public law regulation on the ground of *service public*.<sup>470</sup> In South Africa, however, such a close link is apparently not required.<sup>471</sup>

---

<sup>464</sup> 2000 1 SA 1 (CC) at par 141.

<sup>465</sup> 2001 1 SA 853 (SCA).

<sup>466</sup> 2001 3 SA 1013 (SCA).

<sup>467</sup> See par 3.5.4.

<sup>468</sup> Cf Baxter *Administrative Law* 100 note 51; *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) at 867 per Olivier JA; Pretorius (2002) 119 SALJ 374 at 395 – 396.

<sup>469</sup> Cf *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) at 867 per Olivier JA; Pretorius (2002) 119 SALJ 374 at 395.

<sup>470</sup> See par 3.5.1 above.

<sup>471</sup> This question is closely related to the question of implied statutory powers of organs of state and the tests applied to establish whether such powers exist and what their ambit is; see chapter two at par 3.2.2 above.

This is best illustrated in the case of *Transnet Ltd v Goodman Brothers (Pty) Ltd*.<sup>472</sup> In that case Schutz JA rejected the distinction sought to be drawn by Transnet between its public and private actions.<sup>473</sup> In the passage quoted above,<sup>474</sup> the judge found that the adjudication of tenders for the purchase of gold watches by Transnet was sufficiently closely linked to Transnet's general powers, viz the provision of public transport services, for such action to be a public function. The link, according to the judge, existed in the fact that the purpose for which Transnet acquired the watches was to secure the loyalty of its employees and (ostensibly) such loyalty was needed for Transnet to perform its general function.<sup>475</sup> This link is not particularly strong and the connection between the purchase of the watches and Transnet's general function of providing public transport services is tenuous at best. This conclusion is supported by the judge's equation of the purchase of the watches with the purchase of toilet paper.<sup>476</sup> Although Schutz JA did not describe the hypothetical purchase of toilet paper like that of gold watches as "incidental to the exercise of Transnet's general powers," it is clear that he would have rejected the distinction sought to be drawn by Transnet on similar grounds even if the action under scrutiny related to the purchase of toilet paper.<sup>477</sup> It is subsequently, on Schutz JA's approach, difficult to imagine examples of procurement by Transnet that will not be sufficiently closely linked to its public function in order for such procurement activities to be exempted from public law regulation.

Daniel Malan Pretorius argues that some state commercial activity can be separated from administrative action using this approach to the effect that the former category will not be subject to public law regulation.<sup>478</sup> He proposes a *sine qua non* test in order to establish the causality between the

---

<sup>472</sup> 2001 1 SA 853 (SCA).

<sup>473</sup> *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) at 870 – 871.

<sup>474</sup> At note 437.

<sup>475</sup> *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) at 871.

<sup>476</sup> *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) at 871.

<sup>477</sup> See *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) at 871.

<sup>478</sup> Pretorius (2002) 119 SALJ 374 at 396.

action at stake and a public function.<sup>479</sup> If the body cannot fulfil its public function without engaging in the action under scrutiny, then such action will be sufficiently closely linked to the body's public function and hence be subject to public law regulation.<sup>480</sup> Pretorius's examples are of the purchase of stationery and computers and the lease of premises by an organ of state without which it cannot function.<sup>481</sup> Actions pertaining to these purchases and lease will consequently amount to administrative action and be subject to public law regulation.<sup>482</sup> In contrast, a body's acquisition of cleaning materials for cleaning its offices or of coffee and tea for consumption by its staff, will not amount to administrative action, since these are not sufficiently closely linked to the body's public function in that the body will be able to function without such purchases.<sup>483</sup> Schutz JA rightly concluded in *Transnet Ltd v Goodman Brothers (Pty) Ltd*<sup>484</sup> that this argument is not convincing.<sup>485</sup> It is not clear exactly how this distinction is made.<sup>486</sup> For example, is it possible to claim in any absolute sense that the public body cannot fulfil its public functions without computers or is it simply a claim that the body cannot fulfil its public functions *effectively* or *efficiently* without computers? If the latter is true, then surely an argument can be made that the body will likewise only be able to *effectively* fulfil its public functions if its offices are (relatively) clean so that the

---

<sup>479</sup> Pretorius (2002) 119 SALJ 374 at 396.

<sup>480</sup> Pretorius (2002) 119 SALJ 374 at 396.

<sup>481</sup> Pretorius (2002) 119 SALJ 374 at 396.

<sup>482</sup> Pretorius (2002) 119 SALJ 374 at 396.

<sup>483</sup> Pretorius (2002) 119 SALJ 374 at 396.

<sup>484</sup> 2001 1 SA 853 (SCA) at 871.

<sup>485</sup> This is not to say that I agree with Schutz JA's approach. As will become evident below, I do not think that public function in the extremely wide form used by Schutz JA can be an effective classification criterion.

<sup>486</sup> See also Mitchell *The Contracts of Public Authorities* 226 who notes that "it is evident that a test based upon the nature of the contract tends to be of little value because of uncertainty. This uncertainty is greatest in borderline cases where the need for a sure guide is felt most strongly. The uncertainties in the classification of 'governmental' and 'proprietary' contracts in the United States, and of the distinction between *acte de gestion* and *acte d'autorité* in France, demonstrate this difficulty ... This history of the cases in those countries holds out little hope of finding a satisfactory definition of those 'commercial contracts' which would be fully binding."

purchase of the cleaning materials is also necessary for such body to perform its public functions. If the examples are more narrowly tailored so that one only includes goods in the former category that are absolutely necessary for the particular body to fulfil its public functions,<sup>487</sup> say aircraft by the South African Airways or cleaning materials by a hospital, what is the result when such goods are purchased by another organ of state, say the presidency, that does not absolutely require such goods to fulfil its functions? This dilemma is amplified if one adds a central state procurement process to the example.<sup>488</sup> These examples may seem flippant, but, like Schutz JA's reference to the purchase of toilet paper in *Transnet Ltd v Goodman Brothers (Pty) Ltd*<sup>489</sup> (which seems similarly frivolous), they illustrate the important point that it is no easy task to ascertain the exact level of causality required between the action under scrutiny and the averred public function or the test thereof in order to make a classification on the grounds of public function workable.

Only a very strict test of causality, such as that required by French law in the criterion of *service public*, can make public function a useful classification criterion in the context of state commercial activity. However, as the experience in French law has indicated, the result of such a strict causal link is that very few actions will qualify as subject to public law regulation on this ground. The consequence is that additional or alternative criteria must be utilised in order to prevent the classification approach from being under-inclusive.<sup>490</sup>

---

<sup>487</sup> This may be what Pretorius has in mind in his examples when he refers to a body's acquisition of "stationery or computers to enable it to perform its statutory functions," (2002) 119 SALJ 374 at 396.

<sup>488</sup> If the central procurement arm of the state purchases goods for use by multiple organs of state, how is one to distinguish between the use of such goods that are absolutely required by one organ of state from use by another organ of state where no such absolute necessity exists?

<sup>489</sup> 2001 1 SA 853 (SCA) at 871.

<sup>490</sup> See Brown & Bell *French Administrative Law* 142.

### 3.6 Criterion 6: Impact of the action

Traditionally public law principles of procedural fairness, in particular the *audi alteram partem* principle, applied “when a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights.”<sup>491</sup> In the well-known judgement of Corbett CJ in *Administrator, Transvaal, and Others v Traub and Others*<sup>492</sup> the scope of this rule was extended to also apply in cases where a legitimate expectation is affected. Apart from the apparent source-based approach evidenced in this classic formulation, another criterion emerges, viz that of the impact of the action taken. Adverse impact has consequently been used as a criterion to distinguish instances where public law regulation applied to state commercial activity from those where exclusive private law regulation applied. One finds a similar requirement of adverse impact in PAJA’s definition of administrative action<sup>493</sup> with the result that this criterion remains relevant in the classification approach in South Africa today.

#### 3.6.1 Impact as criterion emerging from public service dismissals

The role of impact as classification factor is illustrated by the contrasting rulings of Goldstone J in *Langeni and Others v Minister of Health and Welfare and Others*<sup>494</sup> and *Mokoena and Others v Administrator, Transvaal*.<sup>495</sup> In both cases the respective applicants were employed as hospital workers by the Transvaal provincial administration.<sup>496</sup> Their employment was governed by

---

<sup>491</sup> *Administrator, Transvaal, and Others v Traub and Others* 1989 4 SA 731 (A) at 748; *South African Roads Board v Johannesburg City Council* 1991 4 SA 1 (A) at 10; Baxter *Administrative Law* 536, 577; Hoexter *Administrative Law in South Africa* 352 – 355; Pretorius (2000) 63 *THRHR* 93 at 94.

<sup>492</sup> 1989 4 SA 731 (A).

<sup>493</sup> The relevant part of the definition of administrative action in s 1(i) of PAJA reads: “‘administrative action’ means any decision taken, or any failure to take a decision...which adversely affects the rights of any person and which has a direct, external legal effect...”

<sup>494</sup> 1988 4 SA 93 (W).

<sup>495</sup> 1988 4 SA 912 (W).

<sup>496</sup> *Langeni and Others v Minister of Health and Welfare and Others* 1988 4 SA 93 (W) at 94; *Mokoena and Others v Administrator, Transvaal* 1988 4 SA 912 (W) at 913.

the Public Service Act<sup>497</sup> and standard form contracts that were identical in all relevant aspects in the two cases.<sup>498</sup> In both cases the applicants were dismissed for misconduct on 24 hours' notice in terms of clause 3 of the standard form employment contract and in both instances the applicants challenged their respective dismissals in the High Court.<sup>499</sup> Both sets of applicants based their challenge on a lack of procedural fairness and in particular the failure of the administration to afford them a hearing before terminating their employment, that is a failure to comply with the principle of *audi alteram partem*.<sup>500</sup> In both cases it was clear that no hearing was given to any of the applicants prior to the dismissals.<sup>501</sup> In *Langeni and Others v Minister of Health and Welfare and Others*<sup>502</sup> Goldstone J rejected the application and held that the *audi* principle did not apply.<sup>503</sup> In *Mokoena and Others v Administrator, Transvaal*,<sup>504</sup> however, Goldstone J ruled that the *audi* principle did apply and consequently set aside the dismissals for want of procedural fairness. Goldstone J explained this difference with reference to the impact of the respective dismissals on the applicants. In the former case, the applicants "had no right or legal interest to remain in their employment after the expiration of the notice period of 24 hours" with the result that their dismissal upon 24 hours' notice did not adversely impact on any of their

---

<sup>497</sup> Act 111 of 1984.

<sup>498</sup> *Langeni and Others v Minister of Health and Welfare and Others* 1988 4 SA 93 (W) at 95; *Mokoena and Others v Administrator, Transvaal* 1988 4 SA 912 (W) at 914.

<sup>499</sup> *Langeni and Others v Minister of Health and Welfare and Others* 1988 4 SA 93 (W) at 95; *Mokoena and Others v Administrator, Transvaal* 1988 4 SA 912 (W) at 914.

<sup>500</sup> *Langeni and Others v Minister of Health and Welfare and Others* 1988 4 SA 93 (W) at 95; *Mokoena and Others v Administrator, Transvaal* 1988 4 SA 912 (W) at 918.

<sup>501</sup> *Langeni and Others v Minister of Health and Welfare and Others* 1988 4 SA 93 (W) at 101; *Mokoena and Others v Administrator, Transvaal* 1988 4 SA 912 (W) at 915.

<sup>502</sup> 1988 4 SA 93 (W) at 101.

<sup>503</sup> It should be noted, however, that Goldstone J was not of the opinion that no public law regulation applied to the relationship between the parties, simply that the *audi* principle in particular did not apply. At 100 the judge stated that because of the statutory dimension of the relationship between the parties, public law regulation would generally apply, but see the remarks of Hoexter JA in *Administrator, Transvaal and Others v Zenzile and Others* 1991 1 SA 21 (A) at 29 regarding this "broader approach" of Goldstone J.

<sup>504</sup> 1988 4 SA 912 (W) at 918, 921.

rights.<sup>505</sup> In contrast, in the latter case the applicants did have rights beyond those conferred by the contract of employment, viz pension rights.<sup>506</sup> According to the judge, in the latter case, “the compulsory Pension Fund of which the applicants became members ... placed them in a completely different category” from the applicants in the former case.<sup>507</sup> As a result of the adverse impact of the dismissals on the applicants’ pension rights, the *audi* principle applied to the administration’s actions in *Mokoena and Others v Administrator, Transvaal*.<sup>508</sup>

Impact as classification factor has also been employed in a number of other judgements in the public employment context.<sup>509</sup> However, this criterion has been significantly widened in *Administrator, Transvaal and Another v Sibiya and Another*,<sup>510</sup> to such an extent that it will no longer be effective in distinguishing between cases such as *Langeni and Others v Minister of Health and Welfare and Others*<sup>511</sup> and *Mokoena and Others v Administrator, Transvaal*.<sup>512</sup> In *Administrator, Transvaal and Another v Sibiya and Another*,<sup>513</sup> upon facts very similar to those in the former two cases, Hoexter JA extended the scope of the requisite rights to be impacted

<sup>505</sup> *Mokoena and Others v Administrator, Transvaal* 1988 4 SA 912 (W) at 917.

<sup>506</sup> *Mokoena and Others v Administrator, Transvaal* 1988 4 SA 912 (W) at 917.

<sup>507</sup> *Mokoena and Others v Administrator, Transvaal* 1988 4 SA 912 (W) at 917.

<sup>508</sup> 1988 4 SA 912 (W) at 917 – 918.

<sup>509</sup> *Moodley and Others v Minister of Education and Culture, House of Delegates, and Another* 1989 3 SA 221 (A) at 234, finding that the impact of a dismissal on the employee was sufficient to warrant the application of the *audi* principle even where no private law right to resist the termination could be identified, but ruling that the application of the principle was ousted by statute in the present instance; *Mokopanele en Andere v Administrateur, Oranje Vrystaat, en Andere* 1989 1 SA 434 (O); *Ntshotsho v Umtata Municipality* 1998 3 SA 102 (Tk) at 109: “The *audi alteram partem* rule comes into play because the decision to terminate the acting appointment would of necessity bring about the termination of the entitlement to the acting allowance”; *Administrator, Transvaal and Others v Zenzile and Others* 1991 1 SA 21 (A) at 35: “In the instant case the decision summarily to dismiss did affect the respondents prejudicially in their rights.”

<sup>510</sup> 1992 4 SA 532 (A).

<sup>511</sup> 1988 4 SA 93 (W).

<sup>512</sup> 1988 4 SA 912 (W).

<sup>513</sup> 1992 4 SA 532 (A).

to include the contractual rights affected by a termination of such contract even on the notice terms of that contract.<sup>514</sup> Following this judgement, it is no longer necessary to point to rights existing outside of the contract of employment, such as the pension rights in *Mokoena and Others v Administrator, Transvaal*,<sup>515</sup> in order to establish the required impact as a condition of the application of the *audi* principle. In this regard Hoexter JA stated:

The [*audi*] rule does not require that the decision of the public body should, when viewed from the angle of the law of contract, involve actual legal infraction of the individual's existing rights. It requires simply that the decision should adversely affect such a right. No more has to be demonstrated than that an existing right is, as a matter of fact, impaired or injuriously influenced. Here the contract of service created reciprocal personal rights for the respective parties. Of immediate significance for the respondents was their right to receive regular remuneration in exchange for their services. The existence of that right was linked to and depended upon the duration of the contract. The appellants' right under the contract to give notice terminating it cannot alter the fact that the decision to give notice palpably and prejudicially affected the existing rights of the respondents.<sup>516</sup>

The consequence of this widening of the impact requirement is that, as far as the classification of state commercial activity is concerned, the focus is no longer on the specific legal interests being affected, but rather on the nature of the impact. In most, if not all, commercial contexts some form of legal interest, mostly contractual rights, will be at stake, thus satisfying half of the impact criterion. It is only the remaining part of the criterion, viz an adverse impact, that remains an effective factor in distinguishing between different categories of state commercial activity. State action that adversely affects a counterparty's rights will consequently be subjected to public law regulation in

---

<sup>514</sup> *Administrator, Transvaal and Another v Sibiya and Another* 1992 4 SA 532 (A) at 538.

<sup>515</sup> 1988 4 SA 912 (W).

<sup>516</sup> *Administrator, Transvaal and Another v Sibiya and Another* 1992 4 SA 532 (A) at 538.



the form of the *audi* principle, but not action that affects the counterparty's rights to her benefit. Judging solely on this criterion, the renewal of a contract of lease, for example, will not be subject to public law regulation, whereas the termination of the same contract will be. This approach is in line with the impact requirement in the definition of administrative action in section 1(i) of PAJA. I will return to this aspect of the impact criterion below.

### 3.6.2 Punitive or disciplinary character of state action

The punitive character of the action under scrutiny is a factor closely related to the impact criterion, especially with the focus on the nature of the impact rather than the interests impacted. It has long been held that public law principles, or public law type principles, apply to private contractual relationships where the action taken under such contract amounts to disciplinary action or has a punitive character.<sup>517</sup> The (potential) adverse impact of such action on the subordinate individual has often been highlighted as the reason for judicial scrutiny of such private action on public law grounds.<sup>518</sup> A similar approach has been applied in the context of state action. In *Administrator, Transvaal and Others v Zenzile and Others*,<sup>519</sup> Hoexter JA highlighted the “disciplinary or punitive nature” of the power as an important reason for applying public law regulation to the dismissals. Particularly significant is Hoexter JA’s reliance on the disciplinary or punitive nature of the action under scrutiny to distinguish the case from the judgement in *Monckton v British South Africa Co*.<sup>520</sup> In the latter case the Appellate Division found that it had no jurisdiction to review the dismissal of a public servant, since the dismissal was based on the contract of employment rather than statutory regulations applicable to the relationship.<sup>521</sup> Hoexter JA,

---

<sup>517</sup> See Pretorius (2002) 119 SALJ 374 at 375 – 382; Hoexter *Administrative Law in South Africa* 121 – 125, 397 – 402; De Ville *Judicial Review of Administrative Action in South Africa* 239; Mureinik (1985) 1 SAJHR 48 at 50.

<sup>518</sup> See *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Africa* 1976 2 SA 1 (A) at 33; Hoexter *Administrative Law in South Africa* 398; Mureinik (1985) 1 SAJHR 48 at 50.

<sup>519</sup> 1991 1 SA 21 (A) at 30, 35.

<sup>520</sup> 1920 AD 324.

<sup>521</sup> *Monckton v British South Africa Co* 1920 AD 324 at 330.

however, pointed to the fact that in *Monckton's* case the action under scrutiny was not of a disciplinary or punitive nature while in the present case it was.<sup>522</sup> That, according to the judge, was “the central fact of this case which distinguishes it from *Monckten's* case.”<sup>523</sup> The punitive or disciplinary nature of the action under scrutiny emerges as the classification factor.

The punitive or disciplinary nature of action as classification factor also emerges from the university cases. As noted above,<sup>524</sup> courts have consistently viewed the relationship between students and universities as contractual. Public law regulation of many actions of universities vis-à-vis students has consequently been denied. However, in *Mokgoko and Others v Acting Rector, Setlogelo Technikon, and Others*<sup>525</sup> a decision of a technikon to refuse registration to a number of senior students was subjected to public law regulation despite the ostensible contractual relationship between the parties and in contrast to the contrary rulings in many other university cases.<sup>526</sup> In applying the *audi* principle, Comrie J stated: “It is plain, in my view, that the second respondent's decision to refuse re-admission to the applicants was punitive and disciplinary in nature.”<sup>527</sup>

---

<sup>522</sup> *Administrator, Transvaal and Others v Zenzile and Others* 1991 1 SA 21 (A) at 35.

<sup>523</sup> *Administrator, Transvaal and Others v Zenzile and Others* 1991 1 SA 21 (A) at 35.

<sup>524</sup> See par 3.2.2.

<sup>525</sup> 1994 4 SA 104 (BG).

<sup>526</sup> See eg *Mkhize v Rector, University of Zululand* 1986 1 SA 901 (D) and *Sibanyoni v University of Fort Hare* 1985 1 SA 19 (CkS).

<sup>527</sup> *Mokgoko and Others v Acting Rector, Setlogelo Technikon, and Others* 1994 4 SA 104 (BG) at 117. See also Mureinik (1985) 1 SAJHR 48 who argues that due to the disciplinary character of the action under scrutiny in *Sibanyoni & Others v University of Fort Hare* 1985 1 SA 12 (CkS) the judge was clearly wrong in concluding at 30 that “the rules of natural justice ... have no application in matters of contract”.

### 3.6.3 Impact as criterion for “administrative action” under PAJA

The inclusion of an impact element in the definition of administrative action in section 1(i) of PAJA<sup>528</sup> has both highlighted and diminished impact as a classification factor. On the face of it, the definition clearly thrusts impact in a narrow sense<sup>529</sup> to the fore of the enquiry whether specific action amounts to administrative action.<sup>530</sup> The very narrow and hence limiting nature of impact as an element of the definition (along with the internal inconsistencies of PAJA) has, however, led the courts to significantly read down this particular

---

<sup>528</sup> “[A]dministrative action’ means any decision taken, or any failure to take a decision...which adversely affects the rights of any person and which has a direct, external legal effect...”

<sup>529</sup> It is not simply any impact that is required in the definition, but specifically an *adverse* impact on *rights*.

<sup>530</sup> This element of the definition of administrative action has attracted a considerable amount of academic comment. Most commentators note that a strict application of this requirement will result in PAJA being seriously under-inclusive and most probably be an unconstitutional limitation of the rights in s 33 of the Constitution, see De Ville *Judicial Review of Administrative Action in South Africa* 51 – 54; Currie & Klaaren *The Promotion of Administrative Justice Act Benchbook* 74 – 81; Currie & De Waal *The Bill of Rights Handbook* 659 – 661; Hoexter *Administrative Law in South Africa* 199 – 204, (2000) 117 SALJ 484. Some academics argue for an extended interpretation of the term “rights” as used in this element of the definition to also include an impact on any legal interests: De Ville *Judicial Review of Administrative Action in South Africa* 53; Quinot (2004) 19 SAPR/PL 543 at 566. Others argue for a wide interpretation of “adverse impact”: Currie & Klaaren *The Promotion of Administrative Justice Act Benchbook* 78 – 79; Hoexter *Administrative Law in South Africa* 199 – 201. These latter arguments are premised on Etienne Mureinik’s analysis of the impact requirement in the application of natural justice at common law: Mureinik in Bennett *et al* (eds) *Administrative Law Reform* 36. Mureinik identifies two theories, the deprivation theory and the determination theory, that can be applied to the impact requirement with vastly different outcomes. In terms of the deprivation theory a decision must “deprive a person of an existing legal right” before the rules of natural justice applies. In terms of the determination theory, however, any decision that “decides what a person’s legal rights are” would be subject to the rules of natural justice. Based on this analysis, Hoexter and Currie & Klaaren argue for the use of the determination theory in the interpretation of the impact element of PAJA’s definition of administrative action.

provision of the Act.<sup>531</sup> In *Van Zyl v New National Party and Others*<sup>532</sup> the term “rights” in section 1(i) of PAJA was described as “not used in the sense of the correlative of legal obligations and duties but in a wider sense that at least encompasses enforceable and *prospective* rights.”<sup>533</sup> In that case the court seems to recognise that the term “rights” can even be as broadly understood as any “legally recognised interest.”<sup>534</sup> In *Dunn v Minister of*

---

<sup>531</sup> One notable exception, however, is the emphasis placed on this aspect of the definition by Yekiso J (for the majority) in *New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang and Another NNO; Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO* 2005 2 SA 530 (C) at par 38 – 40: “The most important of these elements [of the definition of administrative action in PAJA] are, in my view, that the recommendations should adversely affect rights and should have a direct external legal effect. I venture to suggest at this stage that such conduct or action should affect the rights of the person concerned directly rather than indirectly.” The majority judgement in that case was reversed on appeal by the Supreme Court of Appeal, which found it unnecessary to decide whether the actions under scrutiny qualified as administrative action in terms of PAJA, but doubted the High Court’s conclusion that it did not: *Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another* 2005 3 SA 238 (SCA) at par 94. On further appeal to the Constitutional Court, a majority of that court held that at least some of the actions under scrutiny did amount to administrative action in terms of PAJA: *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 2 SA 311 (CC) at par 13. The impact element of the definition did not, however, play any significant role in the respective judges’ opinions in coming to this conclusion. Chaskalson CJ (at par 121), Ngcobo J (at par 480) and Sachs J (at par 646) simply stated that the relevant actions did impact on the rights and/or interests of the parties involved without going into any detail regarding such impact.

<sup>532</sup> 2003 3 All SA 737 (C).

<sup>533</sup> *Van Zyl v New National Party and Others* 2003 3 All SA 737 (C) at par 82 (my emphasis).

<sup>534</sup> *Van Zyl v New National Party and Others* 2003 3 All SA 737 (C) at par 79 where Van Reenen J quoted with approval the statement of Coetzee J in *Secretary for Inland Revenue v Kirsch* 1978 3 SA 93 (T) at 94 that “[t]he word ‘right’, in legal parlance, is not necessarily synonymous with the concept of a ‘legal right’ which is the correlative of duty or obligation. On the contrary, legal literature abounds with ‘right’ being used in a much wider sense and ... in a laxer sense to include any legally recognised interest ...” In *Sebenza Forwarding & Shipping Consultancy (Pty) Ltd v Petroleum Oil and Gas Corporation of SA (Pty) Ltd t/a Petro SA and Another* 2006 2 SA 52 (C) at par 28 a similar broad interpretation was given to this element of the definition.

*Defence and Others*<sup>535</sup> the appointment of a civil servant to a post was also held to fall within the definition of administrative action in PAJA and in particular to fulfil the adverse impact on rights element. The court pointed to the adverse impact of the appointment on the interests of the unsuccessful applicants for the position in order for the last-mentioned element of the definition to be fulfilled.<sup>536</sup> Upon this reasoning, decisions that beneficially impact on a specific party, such as the award of a tender or renewal of a lease, will always fulfil the impact element of the definition of administrative action in PAJA if there were competing parties who as a result of the decision lost out. However, where there are no competing parties, a beneficial decision would supposedly not qualify as administrative action for at least a failure to impact adversely on rights.

The artificiality of this reasoning was highlighted in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*.<sup>537</sup> In that case the Minister of Public Works leased state land situated on the quayside in Hout Bay to a private company.<sup>538</sup> A number of adjacent tenants consequently sought to have this lease set aside in terms of PAJA.<sup>539</sup> There were no competing parties for the lease of the specific state land.<sup>540</sup> In assessing whether the conclusion of the lease amounted to administrative action in terms of PAJA, Nugent JA stated:

While PAJA's definition purports to restrict administrative action to decisions that, as a fact, 'adversely affect the rights of any person', I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to

---

<sup>535</sup> 2006 2 SA 107 (T).

<sup>536</sup> *Dunn v Minister of Defence and Others* 2006 2 SA 107 (T) at par 5.

<sup>537</sup> 2005 6 SA 313 (SCA).

<sup>538</sup> *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 6 SA 313 (SCA) at par 4 – 5.

<sup>539</sup> *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 6 SA 313 (SCA) at par 6.

<sup>540</sup> *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 6 SA 313 (SCA) at par 11 – 12.

me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution.<sup>541</sup>

In a significant reading down of the impact element of the definition, Nugent JA concluded that administrative action is action that “has the capacity to affect legal rights,” that “impacts directly and immediately on individuals” and that has “direct and immediate consequences for individuals or groups of individuals.”<sup>542</sup> In applying this broad reading of the definition to the matter at hand, the court concluded that the lease of the property did amount to administrative action due to the “immediate and direct legal consequences” for the *successful* tenant.<sup>543</sup> This approach clearly does away with the need for any adverse nature of the required impact.<sup>544</sup> As a result, the impact element of the definition of administrative action in PAJA no longer distinguishes between state action that has a beneficial impact and state action that has an adverse impact. When viewed with the extremely broad interpretation of the term “rights” in this section,<sup>545</sup> the impact criterion in PAJA’s definition of administrative action has practically been reduced to vanishing point.

Despite the practical elimination of impact as an element in PAJA’s definition of administrative action, impact still remains an important factor in the application of specific public law rules to state action under that Act. This

---

<sup>541</sup> *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 6 SA 313 (SCA) at par 23.

<sup>542</sup> *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 6 SA 313 (SCA) at par 23 – 24.

<sup>543</sup> *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 6 SA 313 (SCA) at par 28.

<sup>544</sup> In this sense the court’s approach seems to embrace the determination theory in contrast to the deprivation theory, see note 530 above.

<sup>545</sup> Also note the Constitutional Court’s inclusion of “legal interests” when it concluded in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 21: “[A] decision in awarding or refusing a tender constitutes an administrative action ... because the decision ... materially and directly affects the legal interests or rights of tenderers concerned” (footnotes omitted).

point is confirmed in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*.<sup>546</sup> While the court classified the conclusion of the lease as administrative action, it denied the application of the rules of procedural fairness encapsulated in section 3 of PAJA, to such action.<sup>547</sup> Nugent JA pointed to the further requirement in section 3(1) of PAJA for rights or legitimate expectations to be materially and adversely affected before that section applied and concluded that since neither of the applicants had any such rights or legitimate expectations, the section did not apply.<sup>548</sup>

The outcome in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*<sup>549</sup> illustrates how easily the impact requirement can be manipulated to either subject state action to public law regulation or shield it from such regulation. On the one hand, the criterion that action should adversely affect the rights of any person before such action would be subject to PAJA<sup>550</sup> is interpreted to vanishing point, with the result that state action is brought under the scrutiny of PAJA irrespective of the impact of such action. On the other hand, the almost identical impact requirement in section 3(1) of PAJA<sup>551</sup> is interpreted to shield the state action under scrutiny from the

---

<sup>546</sup> 2005 6 SA 313 (SCA) at par 29 – 30.

<sup>547</sup> *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 6 SA 313 (SCA) at par 30 – 32.

<sup>548</sup> *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 6 SA 313 (SCA) at par 29 – 32. The same reasoning can be applied to the rules of procedural fairness encapsulated in s 4 of PAJA and the right to reasons set out in s 5 of PAJA.

<sup>549</sup> 2005 6 SA 313 (SCA).

<sup>550</sup> S 1(i).

<sup>551</sup> The impact requirements in s 1(i) and 3(1) are clearly not identical. S 3(1) limits the impact requirement to instances where such impact is not only adverse but also material, but also widens the impact requirement to instances where something less than rights, viz legitimate expectations, are at stake. Apart from the additional inquiry into the potential existence of legitimate expectations in the case (which would in any event broaden the application of public law rules rather than restrict it), there is no indication that these differences in formulation moved the court to deny the application of the s 3 rules in contrast to its finding in respect of the s 1 definition, see *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 6 SA 313 (SCA) at par 29 – 32. Leaving legitimate expectations aside, the court's refusal to apply s 3 to the instant matter is based on its conclusion that "[i]t has not been shown that any rights - or even prospective rights - of any of

procedural fairness rules of that section. Impact is clearly not an effective criterion to classify state action as either subject to public law regulation or not.

## **4 Evaluation of the classification approach**

### **4.1 Criticism of the classification approach**

The classification approach can be criticised at various levels. At a macro level one can direct critique at the approach itself, while at a micro level one can focus on the various criteria used in the classification approach and point to various problems underlying such criteria. While criticism of the first kind discredits the approach in its entirety and suggests that the approach is not feasible, the second type of criticism suggests that specific criteria are not useful or that certain combinations of criteria need to be utilised in order to implement effective regulation based on a classification approach.<sup>552</sup> Criticism at a micro level has already been noted in relation to most of the criteria discussed above and I do not intend to repeat such criticism here. However, when criticism at such micro level is presented cumulatively the result may be similar to criticism at a macro level, that is of discrediting the entire approach. The question in this regard is whether any of the criteria used in the classification approach remains viable, taking account of the micro level criticism. This question is addressed below alongside the macro-level criticism.

Cora Hoexter argues forcefully that the formalism as well as the excessive reliance on conceptual reasoning inherent in an approach based on the classification of action divert the attention away from the fundamental

---

the appellants (or of any other person) have been adversely affected by the Minister's decision," a formulation that seems identical to the one found in s 1(i), but on which the court reached the exact opposite conclusion.

<sup>552</sup> Arguments such as these have often been made in support of the public-private law dichotomy of Western legal systems, see Szladits in David (ed) *International Encyclopedia of Comparative Law Volume II The Legal Systems of the World Their Comparison and Unification* par 37; Baxter *Administrative Law* 62 – 63; Floyd *Die Owerheidsooreenkoms – 'n Administratiefregtelike Ondersoek* 83.



questions that should be asked in such cases.<sup>553</sup> Questions such as the underlying power relationship between the parties may very well be addressed in the form of the concepts used but, as Hoexter argues, such a roundabout way of addressing the “real” concerns in a given case is not conducive to the development of a coherent system of controls where the real reasons for subjecting state action to specific forms of regulation are apparent.<sup>554</sup>

A conceptual approach such as the classification one also has, as Hoexter states, “unfortunate all-or-nothing consequences.”<sup>555</sup> It results either in full-blown public law regulation or exclusive private law regulation, while no room is left for a midway point where limited public law regulation applies. Michael Swainston argues that in English law a classification approach has had a very negative impact on the substantive development of the judicial review jurisdiction.<sup>556</sup> The notion that action must be classified as *either* public *or* private has led “to the idea that private rights and public law are distinct and mutually exclusive, and to an automatic equation of contract with private rights.”<sup>557</sup> This in turn has led to judicial under-regulation of state use of private forms such as contract. Both public and private law regulation are impoverished by this mutual exclusivity induced by the classification

---

<sup>553</sup> Hoexter (2004) 121 *SALJ* 595 at 618.

<sup>554</sup> Hoexter (2004) 121 *SALJ* 595 at 618. Cf Black in Black, Muchlinski & Walker (eds) *Commercial Regulation & Judicial Review* 157: “[T]here is perhaps a danger in being obsessed, or at least diverted, by the question of what is ‘public’ and what is ‘private’. Instead of using a classification based on a body’s institutional relationship with the state to determine the legal principles that should apply to it, we should rather start by looking at the type of function being exercised, asking what duties and responsibilities should accompany the exercise of such functions and to whom should they be owed, what degree of autonomy should those exercising them have and what degree of judicial supervision should be exercised over them, and use that, not a narrow public/private dichotomy, as the basis for determining the legal principles which should apply.”

<sup>555</sup> Hoexter (2004) 121 *SALJ* 595 at 616.

<sup>556</sup> See also Bailey 2007 *Public Law* 444 at 462, 463: “Time would be better spent on the substantive case law on these matters than on a debate on amenability.”

<sup>557</sup> Swainston in Black, Muchlinski & Walker (eds) *Commercial Regulation & Judicial Review* 104. See also Arrowsmith (1990) 106 *LQR* 277 at 290 – 291.

approach. Whereas substantive principles tailored to the specific needs of state commercial activity may have readily developed if public and private law principles were not kept separate in such instances by the classification approach, one is left at present with a choice between applying either general principles of contract or administrative law to such action, neither of which often adequately fits the bill. The courts' preoccupation with the formal question of classifying the action under scrutiny results in a failure to develop substantive legal rules suitable to regulate the unique context of state commercial activity.<sup>558</sup>

A related criticism is the tendency of this approach to present disputes in the context of state commercial activity as bipolar. As Black and Muchlinski argue in a related context, this has the adverse result of "the consideration of the question framed by the interests of the parties and the outcome led by the evidence presented by the parties, which distorts the multi-faceted nature of many of these ... decisions."<sup>559</sup> Baxter argues that disputes flowing from relationships between organs of state and individuals are "trilateral and not bilateral."<sup>560</sup> This is because the public interest and the interests of the organ of state do not necessarily coincide. He notes, with specific reference to judicial regulation of public tender decisions, that the "third dimension" of such disputes is often ignored by courts.<sup>561</sup> One can expand this line of reasoning by arguing that there are often more than three dimensions to such disputes.

---

<sup>558</sup> Craig argues along similar lines that the real problems experienced in subjecting the actions of private bodies to public law judicial regulation lie in the substantive rules to be applied in such instances. He argues that many public law rules are simply not suited to apply in such instances and that these (substantive) questions are the ones to be addressed in extending public law judicial regulation, also in the context of "changes in the pattern of government ... in the modern day," referring to the increased use of private forms by organs of state: Craig in Taggart (ed) *The Province of Administrative Law* 213.

<sup>559</sup> Black & Muchlinski in Black, Muchlinski & Walker (eds) *Commercial Regulation & Judicial Review* 9, who present this argument in the context of judicial review of commercial regulation decisions in English law. See also Cane in Parker *et al* (eds) *Regulating Law* 217 for a similar argument in relation to access to information.

<sup>560</sup> Baxter *Administrative Law* 58.

<sup>561</sup> Baxter *Administrative Law* 59.

Viewing the public interest as a single-faceted concept may be overly simplistic. The important point, however, is that the classification approach seems to deny the multifaceted nature of these disputes and, it is submitted, contributes significantly to the ignorance of, or denial by, courts of the complex nature of such relationships. When one keeps in mind that the classification approach tends to lead only to conceptual legal development rather than the development of substantive legal rules, it follows that the substantive rules framing state commercial activity also do not adequately take account of the complex nature of relationships flowing from that activity.<sup>562</sup> In other words, the methodology adopted by the courts results in flawed substantive law.

The classification approach furthermore masks the role of courts in the regulation of state commercial activity. By imposing conceptual reasoning between the regulation<sup>563</sup> and the reasons why such regulation applies,<sup>564</sup> the role of the courts and, importantly, the reasons why the courts are involved are obscured. The regulation is applied because the action falls into a certain

---

<sup>562</sup> Freedland argues that classifying state action as purely contractual may also have the detrimental impact of narrowing *locus standi* in administrative law disputes in English law and subsequently public law regulation of important public functions in that “[t]he notion of privity of contract is the very way in which economic relations are structured as dual relationships rather than as multi-partite ones”. When this notion is applied to government by contract, “the doctrine of privity of contract ensures that the consumer has no direct contractual relationship with the service procurer. It would not be wholly surprising to find that, by extension of that reasoning, there were many situations in which the citizen as consumer had no sufficient interest to seek judicial review of the actions or policies of the government department which had procured the service in question.” He goes on to argue that the problem may even go deeper than simply *locus standi* in that “[b]y insisting on the exclusiveness of the bi-partite contract, the doctrine of privity of contract both practically and symbolically singles out the interest of the individual as consumer from the larger group interest of which it forms part, as well as from the general public interest”: Freedland 1994 *Public Law* 86 at 99 – 100.

<sup>563</sup> That is either the rules of public law or private law applied to the action under scrutiny *after* a classification has been done.

<sup>564</sup> That is in the form of the criteria applied to do the classification.

category rather than directly as a result of the reasons that motivated that classification in the first instance.

Probably one of the biggest points of criticism against the classification approach, and certainly the most fundamental, is its indeterminacy. As noted in the discussion of the various individual criteria above, these criteria cannot consistently classify between different forms of state action. The presence of some of these criteria, such as the source of the power exercised and the public interest, simply depends on the level of generality of the analysis, which is a completely arbitrary choice. Other criteria, such as public function and impact, are so vague that no definite content can be given to them. In this respect Craig argues:

Statements that a body must have a sufficiently 'public element' or must be exercising a public duty cannot function as anything other than conclusory labels for whatever we choose to pour into them. They cannot guide our reasoning in advance.<sup>565</sup>

Some of these criteria are always present in some form or another, such as superior power, public interest and impact. The end result is that the classification approach itself cannot effectively classify state commercial activity as either subject to public or private law regulation with any measure of consistency or certainty. Cora Hoexter rightly argues that the application of specific forms of judicial regulation cannot depend on such contingent determinations.<sup>566</sup> From a commercial point of view such uncertainty is also intolerable. In commercial transactions it is of the utmost importance that the parties be able to structure their relationship with a high degree of certainty. In the context of the classification approach, such certainty is simply not available to the state, which fundamentally undermines its ability to effectively participate in the market.

---

<sup>565</sup> Craig in Corder & Maluwa (eds) *Administrative Justice in Southern Africa* 28.

<sup>566</sup> Hoexter (2004) 121 *SALJ* 595 at 618.

## 4.2 Some positive aspects of the classification approach

The classification approach does have some positive attributes. The approach has been useful in the way in which it has crystallised the underlying considerations that motivated increased regulation of state commercial activity. Although these have been stated as criteria used to classify state action as either subject to public or private law regulation, a number of the criteria can just as well be seen as reasons for increased judicial scrutiny. With other words, although these criteria have developed by means of often artificial conceptual reasoning, they may also be of direct use in the development of substantive legal rules. The presence of superior power or authority is a good example. Once these factors have received judicial recognition in the classification approach, it is much easier to point to their presence in other instances in order to apply specific (increased) legal regulation to such instances. In this sense the classification approach can act as a useful platform for the more general judicial regulation of specific legal concerns such as inequality of bargaining power.<sup>567</sup>

---

<sup>567</sup> Murray Hunt notes an analogous advantage in English law. He argues that the increasing use of private forms by the state to fulfill its traditional public functions may have the effect of extending the reach of public law principles to previously private spheres: "As contractualisation proceeds, the public/private distinction becomes less pronounced and a corresponding opportunity arises for courts to assert their general public law principles over all exercises of power, regardless of the source of that power ... If English courts continue to forsake the Diceyan model of constitutionalism as the basis for their jurisdiction, as many have been doing in recent years, and continue to make progress towards articulating the nature of that jurisdiction in terms of the enforcement of constitutional values in the face of exercises of power, the disappearance of any rigid public/private distinction may provide the long-awaited opportunity for public law to extend its fiefdom to the formerly 'private' sphere of what at present still remains the largely unaccountable power of corporate interests:" Hunt in Taggart (ed) *The Province of Administrative Law* 38 – 39. As argued above, the classification approach may contribute to the identification of those concerns that call for "the enforcement of constitutional values" irrespective of whether it is the state or some private actor under scrutiny. It is evident that this advantage is premised on the eventual demise of the classification approach itself, since the wide-ranging application of public law principles will eventually do away with the need for classifying action. However, the positive aspect of the classification approach to be noted in this regard is the way in which it can extend the reach

To the extent that the state has a choice of legal forms in its various activities, the classification approach can assist the state to make an informed choice as to the form it wishes to use. In French law this is clearly illustrated by the criterion of *clauses exorbitantes*.<sup>568</sup> By including such clauses in its contracts, the French state knows *a priori* that such contract would be subject to public law regulation. As a result, it can tailor its actions in terms of the contractual relationship much more precisely in line with legal requirements applicable to that form of relationship. A more fundamental advantage of identifying this choice of forms by the state is the potential regulation of that choice in itself. This recognition may open the door to public law regulation of the initial choice made by the organ of state prior to the conclusion of the transaction rather than the transaction itself.<sup>569</sup> With clear guidelines as to how that choice is to be exercised, the courts may be able to effectively scrutinise state commercial activity without undue interference in market transactions. It also allows courts to be vigilant about deliberate attempts by the state to circumvent public law control of its actions by casting such action in private law forms.

---

of public law principles beyond the traditional narrow application of such principles based on the identity of the actor involved and/or source of the power exercised.

<sup>568</sup> See par 3.3.2 and 3.3.5 above for a discussion of this criterion.

<sup>569</sup> Freedland notes a similar lack in English administrative law to regulate these pre-contractual aspects of state commercial activity and the need to address such deficiency: "One result of this decision-based tactical-level approach is that the case law of administrative law has, it must be said, failed as yet to produce a sophisticated strategic analysis of the dynamics of government by contract. It is clear that, by contrast, civilian systems of public law such as the French *droit administratif* have developed a detailed analysis of all the different stages of government contracting such as is lacking to our system, giving greater attention to the pre-contractual stages at which the strategy of contracting is formulated, the function to be contractualised is designed and the terms or basis of contracting are specified, and the tendering process undertaken": Freedland 1994 *Public Law* 86 at 98 (footnotes omitted).

## 5 Conclusion

In this chapter I analysed the judicial regulation of state commercial action by means of a classification approach. It has been shown that this is the route followed by South African courts in oversight of state commercial activity. Such activity is either subject to normal public law regulation, mostly in the form of administrative law rules, or normal private law regulation, mostly in the form of contract law. The basic premise of the classification approach is that state action in a given instance can be classified as falling into either one of these two categories, with the result that the usual rules of the relevant category apply. Disputes flowing from state commercial activity are hence treated by courts as either a matter of administrative law or of contract. The classification of the action under scrutiny consequently becomes all-important.

Six basic criteria emerge from the South African jurisprudence of the classification approach that are used to categorise the state action under scrutiny. These are:

- The identity of the actor;
- the source of the power exercised;
- superior power or authority;
- public interest;
- public function; and
- impact of the action.

These criteria are not mutually watertight categories and there is a measure of overlap between them. In some instances one criterion may lead a court to conclude that another is present, that is, one criterion may function as an element or component of another criterion. These criteria are also mostly used in combination and not exclusively. In some cases different criteria may be presented as alternative indications of the classification reached, while in other judgements it is the combined presence of multiple criteria that result in a particular classification.

The analysis of the various criteria used in the classification approach has indicated that none of these criteria is satisfactory. I argued that the classification approach itself is not a viable approach to the judicial regulation of state commercial activity for a variety of reasons. Chief amongst these reasons is the inherent indeterminacy of the approach, with resultant uncertainty and potential for manipulation.

There is, however, a more pressing theoretical problem with the classification approach. In the introduction to this chapter,<sup>570</sup> I suggested that the classification approach is at odds with Karl Klare's notion of transformative constitutionalism. In his very influential article of 1998 Klare describes this notion as:

[A] long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform,' but something short of or different from 'revolution' in any traditional sense of the word. In the background is an idea of a highly egalitarian, caring, multicultural community, governed through participatory, democratic processes in both the polity and large portions of what we now call the 'private sphere.'<sup>571</sup>

In arguing that the South African Constitution does indeed embrace this notion, Klare states:

---

<sup>570</sup> Par 1 above.

<sup>571</sup> Klare (1998) 14 *SAJHR* 146 at 150.



This evidence of the substantively postliberal and transformative aspirations of the Constitution strongly implies another, less obvious, innovation. The Constitution invites a new imagination and self-reflection about legal method, analysis and reasoning consistent with its transformative goals. By implication, new conceptions of judicial role and responsibility are contemplated. Judicial mindset and methodology are *part of the law*, and therefore they must be examined and revised so as to promote equality, a culture of democracy and transparent governance. Accordingly, the drafters cannot have intended dramatically to alter substantive constitutional foundations and assumptions, yet to have left these new rights and duties to be interpreted through the lens of classical legalist methods. They cannot have assumed that the document's lofty ambitions would be interpreted according to, and therefore constrained by, the intellectual instincts and habits of mind of the traditional common or Roman-Dutch lawyer trained and professionally socialized during the apartheid era. On my reading, the Constitution suggests not only the desirability, but the legal necessity, of a transformative conception of adjudicative process and method.<sup>572</sup>

The judicial regulation of state commercial activity by means of a classification approach, as currently employed in South African courts, is one such “classical legalist method”. It is no longer a desirable “conception of adjudicative process and method” in South Africa’s new constitutional dispensation. Simply put, the classification approach is out of place in transformative constitutionalism.

---

<sup>572</sup> Klare (1998) 14 *SAJHR* 146 at 156.

As noted above,<sup>573</sup> the classification approach masks rather than illuminates the reasons why courts engage in the regulation of state commercial activity in a particular form in specific cases. Rather than engaging in the substantive reasons why regulation of a certain type is called for, courts using the classification approach simply apply off-the-shelf rules to the action under scrutiny based on formalistic and conceptual reasoning pertaining to the category of such action. More disconcerting is the tendency of such judgements to make the rules seem obvious. Formulated differently, the classification approach creates the impression that a court is necessitated to apply a particular form of regulation and has no choice in the matter. Once the category of the action is established, the appropriate regulation follows automatically. Closely linked to this concern is the ostensible determinacy with which the classification approach is applied and/or of the results of the classification approach relied upon. Again, the notion is created that by applying the rubric of the (relatively general) criteria used in this approach to the facts at hand, the court can reach specific and certain conclusions regarding the rules to be applied to the action under scrutiny. This is exactly the kind of denial of indeterminacy and choice Klare objects to.<sup>574</sup> In the classification approach, one finds a denial of the choice the executive has when engaging in commercial activity regarding the legal ordering or regulation of such activity. One finds a denial of the courts' active role in the state's very engagement in commercial activity. This is a denial of the reality that courts, as part of the state, are just as much party to state commercial transactions as the executive and legislature are. It is a denial that there is a choice as to how state commercial activity in a given instance is to be regulated, that is, to what extent it is allowed, and to what extent repudiated, by courts under the classification approach. It is a denial of the courts' responsibility for the commercial and/or economic and social effects of their

---

<sup>573</sup> See par 4.1 above.

<sup>574</sup> Klare (1998) 14 *SAJHR* 146 at 165.

judgements in state commercial activity cases.<sup>575</sup> In this respect the following criticism of Klare is valid in relation to the classification approach:

Expressions of faith in the constraining power of legal texts and ritual invocation of the law/politics boundary obscure and mystify the choices judges and advocates routinely make in their interpretive work. This reduces the transparency of the legal process, thereby undermining its contribution to deepening democratic culture ... My fear is that 'caution' of this kind (some would call it 'professionalism') might in some cases discourage a judge or advocate from investing intellectual resources in interpretive projects that might, if successful, produce 'non-obvious' results (ie, results that, while morally or politically appealing, appear to require a leap too far beyond what the legal materials - on first impression - appear obviously to require or permit). Constitutional transformation might suffer accordingly.<sup>576</sup>

There are further reasons why the classification approach is not in line with the project of transformative constitutionalism. One reason is the impression it creates of a sphere of state activity that is isolated from public law (or constitutional) scrutiny. An important aspect of the Constitution in advancing its transformative goals is its horizontal application. In Klare's words "the Constitution intends to irradiate democratic norms and values into the so-called 'private sphere,' particularly the market ..."<sup>577</sup> In the light of this purpose, it is unthinkable that the state be allowed to operate outside of public law regulation when it enters the market.<sup>578</sup> In fact, a strong case can be

---

<sup>575</sup> Cf Langa (2006) 17 *Stell LR* 351 at 353 – 358.

<sup>576</sup> Klare (1998) 14 *SAJHR* 146 at 171. See also Langa (2006) 17 *Stell LR* 351 at 353.

<sup>577</sup> Klare (1998) 14 *SAJHR* 146 at 155.

<sup>578</sup> For similar concerns in English law see Hunt in Taggart (ed) *The Province of Administrative Law* 34; Freedland 1994 *Public Law* 86 at 102; Alder (1993) 13 *Legal Studies* 183 at 189 referring to the "grotesquely undemocratic idea that public authorities have a private capacity;" Davies in Freedland & Auby (ed) *The Public Law/Private Law Divide* 129:

made out for the view that the state should be subjected to higher public law regulation when it enters the market for the very purpose of transplanting such principles to the hitherto “private sphere” of the market.<sup>579</sup> A final argument against the classification approach revolves around the constitutional obligation of transparency. In a considerable number of sections the Constitution (explicitly and implicitly) lays down the principle of transparency<sup>580</sup> and Klare rightly points to these as establishing a vision of participatory governance in South Africa.<sup>581</sup> This principle is also expressly made applicable to state commercial activity.<sup>582</sup> The constitutional call for transparency and participation in governance, and in particular state contracting as a form of governance, should also mean a transparent method of regulating such activity, which includes judicial regulation. As I argued above,<sup>583</sup> the classification approach does not result in transparent regulation

---

“[T]he law could do much more to ensure that contracts are not simply an area of unaccountable discretionary power for the government.”

<sup>579</sup> See also Langa J’s remarks regarding the state as “role model” in *S v Makwanyane and Another* 1995 3 SA 391 (CC) at par 222: “Implicit in the provisions and tone of the Constitution are values of a more mature society, which relies on moral persuasion rather than force; on example rather than coercion. In this new context, then, the role of the State becomes clear. For good or for worse, the State is a role model for our society;” *Ex parte Minister of Safety and Security and Others: In re S v Walters and Another* 2002 4 SA 613 (CC) at par 6 and *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* 2006 2 All SA 175 (E) at par 82. See also the arguments presented by Seddon *Government Contracts* 12 – 13 in the Australian context on the government as “moral exemplar” as reason for placing higher standards on government commercial activities and Davies (2006) 122 *LQR* 98 at 105 on a similar argument in English law. Pakuscher argues that in German law the state is also subject to higher standards irrespective of whether it acts under private or public law because of its obligation to “pay respect to the basic rights of the Constitution.” He submits that for this reason “the administration cannot evade judicial control, even if the State uses means of private law.” Pakuscher (1971) 20 *Journal of Public Law* 273 at 285.

<sup>580</sup> See the preamble, ss 1, 32, 33, 34, 36, 39, 40, 41, 57, 59, 70, 72, 116, 118, 160, 195, 199, 215, 216, 217.

<sup>581</sup> Klare (1998) 14 *SAJHR* 146 at 155.

<sup>582</sup> Constitution s 217.

<sup>583</sup> See par 4.1 above.

of state commercial activity. The isolation of such activity from public law regulation significantly reduces the level of public participation in state commercial activity as a form of governance. All of this is clearly out of step with the vision of participatory democracy fostered by the Constitution.

In response to this “disconnect between the Constitution's transformative aspirations”<sup>584</sup> and the classification approach, I cannot formulate the issue better than the following two extracts from Klare’s article:

[T]he legal profession needs to be more candid with itself and with the community at large about the politics of adjudication and to accept more forthrightly our responsibility (however limited and partial) for constructing the social order through adjudicative practices. Such candor would empower publics to examine, discuss and criticize the now often hidden political and moral assumptions that steer adjudication<sup>585</sup>  
...

A more politically self-conscious and candid legal process would surely be faithful to the Constitution's democratic ethos and, in particular, would comply with and give meaning to the explicit command of s 41(1)(c) that all organs of state at every level 'must - . . . provide . . . transparent, accountable and coherent government[.]' Indeed, the Constitution seemingly imposes an *obligation* of political self-reflection and candor upon the judiciary.<sup>586</sup>

The practical and theoretical unfeasibility of the classification approach forces one to reconsider the entire endeavour of judicial regulation of state commercial activity. The question to be answered is whether there is an alternative approach the courts can take to regulate such activity that does not

---

<sup>584</sup> Klare (1998) 14 *SAJHR* 146 at 151.

<sup>585</sup> Klare (1998) 14 *SAJHR* 146 at 164.

<sup>586</sup> Klare (1998) 14 *SAJHR* 146 at 165.

fall subject to the same critique expressed above. Such alternatives will be explored in the following chapters.

## CHAPTER FOUR

### EXCLUSIVELY PRIVATE LAW APPROACH

#### 1 Introduction

In chapter three I argued that the current South African approach to the judicial regulation of state commercial activity is deficient. The current approach is premised on the ability of the court to categorise the particular state action before the court as subject to either public or private law regulation. The conclusion in chapter three necessitates a search for alternative approaches to judicial regulation of state commercial activity. The most obvious alternatives are approaches that are not premised on a choice between public and private law regulation in every given instance. One possibility is to apply either private law or public law exclusively to all instances of state commercial activity. Under either an exclusively private law approach or an exclusively public law approach the criticism raised in chapter three against the classification dimension of the present approach will arguably be eliminated. In this chapter and the following chapter I accordingly investigate the feasibility of these alternative approaches. In this chapter I assess an approach that relies exclusively upon private law, in particular contract law,<sup>1</sup> to regulate all state commercial activity. In the next chapter I will explore an approach that relies upon public law, in particular administrative law, regulation.

The approach taken here is premised on an instrumental perspective of private law as a regulatory system. Although, as Collins notes,<sup>2</sup> such a view may surprise many contract lawyers, it is by no means a novel approach or

---

<sup>1</sup> The focus on contract law is simply because, as Ehlers *Verwaltung in Privatrechtsform* 27 states: “Der Vertrag ist die zentrale Handlungsform des Privatrechts” (contract is the central form of action of private law (my translation)).

<sup>2</sup> Collins *Regulating Contracts* 56 – 58. See also generally Daintith in Daintith (ed) *Law as an Instrument of Economic Policy: Comparative and Critical Approaches* 4 who notes: “[M]any lawyers still react with unease or even distaste when invited to view law as an instrument of policy” and Collins *The Law of Contract* 2 – 3, 9, 11, 35, 94 *et seq*, 279 – 283, 429 – 430.

even a particularly radical one.<sup>3</sup> Private law clearly pursues instrumental purposes similar to other more traditional forms of regulation.<sup>4</sup> It differs only in form, which may perhaps mask its regulatory functions, but certainly does not diminish it.<sup>5</sup> Taking such an instrumental view as its point of departure this chapter explores the ability of private law, in particular contract law, to achieve regulatory goals in the context of state commercial activity and, secondly, it investigates a number of aspects of contract law that may either impede or enhance effective regulation of state commercial activity.

In section two I focus on the ability of contract law to achieve regulatory goals akin to other, more traditional forms of regulation of state activity. I start

---

<sup>3</sup> It has been almost 100 years since this view was considered radical in the works of Roscoe Pound and the realist movement in American jurisprudence. The realists rejected a formalist view of the common law as a self-contained logical system, which was not influenced by “external” policy factors and in turn was not aimed at achieving particular political or social policy purposes. Instead, the realists critically studied common law as embedded in social reality with distinct social effects. This proposition, linked to the insight that there could be no certainty in law largely because of the indeterminacy of language, leads to the realisation that judges have a choice when applying common law rules to specific instances and, accordingly, that the common law system could be used in this fashion to further specific policy objectives. The realist movement had a profound impact on the development of Western legal thought over the last century. Its central insights are shared across the (political) spectrum from the more conservative law and economics school of thought to the more radical critical legal studies movement and its offshoots. On the realist movement generally, see Summers *American Legal Theory*; Van Blerk *Jurisprudence An Introduction* 55 – 81; Cotterrell *The Politics of Jurisprudence* 182 – 215; Gilmore *The Ages of American Law* 77 *et seq*; Twining *W Karl Llewellyn and the Realist Movement*; Gilmore (1961) 70 *Yale LJ* 1037.

<sup>4</sup> Van der Merwe *et al Contract: General Principles* 7; Collins *Regulating Contracts* 56 – 62; Kirchner in Hoffmann-Riem & Schmidt-Aßmann (eds) *Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen* 65 – 67, 74; Lubbe & Murray *Farlam & Hathaway Contract* 12, 17.

<sup>5</sup> Lubbe (1990) 1 *Stell LR* 7 at 14 – 16 states that terms such as “freedom of contract”, “*pacta sunt servanda*”, “consensualism” and “freedom of trade” are often used in contract law as self-explanatory concepts that inform specific rules of contract law, but that they may indeed obscure true principles informing the content of private law rules. Instead, he shows that such terms are merely characteristics of a (regulatory) system that is aimed at or premised on particular (public) policy objectives such as the protection of private autonomy as a basic premise of capitalist theories of wealth maximisation in a free-market economy.



by arguing that contract law does not necessarily entail less protection of the individual when interacting with the state and may even in particular circumstances amount to increased protection of the individual. I subsequently identify a (non-exhaustive) number of desired regulatory goals, expressed in the form of regulatory concerns, in the regulation of state commercial activity and I assess contract law's ability to achieve such goals. The first of these goals is controlling the inherent power disparity in state commercial activity and in particular curbing any abuse of power by the state. Private law rules that are relevant in achieving this first goal are those relating to improperly obtained consent, the legality of transactions based on public policy analysis as well as the private law response to standard-form contracts and related unfair contract terms. My analysis indicates that further development is required for these rules to achieve their full potential as effective regulatory tools. The particular factors that may impact, positively or negatively, on this development are the prevailing notion of the state as equivalent to private market players, the difficulty of direct reliance on open norms and critical differences between public policy analysis in relation to the state and private individuals respectively. The second regulatory goal is controlling the pre-contractual stage of state commercial activity, especially in order to ensure fair access to government business. Private law rules relevant to the achievement of this second goal are located in a two-contract approach to tenders and standards of conduct in negotiation, which include restrictions on refusals to contract, the doctrine of *culpa in contrahendo*, and delictual liability. The third regulatory goal relates to *ultra vires* acts of the state and managing the consequences of the state's limited capacity in state commercial activity. Private law rules that may be relevant in achieving this third goal are estoppel, restitution or enrichment and again delictual liability. The final regulatory goal is controlling the state's motives or purposes in state commercial activity and in particular ensuring that the public interest is always served. I assess private law rules relating to implied terms, limited capacity and legality as potential avenues towards the achievement of this fourth goal. Throughout, I analyse the various doctrines and rules of private law that may effectively address or may be developed to address the concerns underlying

the regulatory goals identified and I assess the probability of development where it is required.

In section three I consider the question whether private law regulation produces increased efficiency and effectiveness in both regulation and in the regulated activity. Section four investigates the important quality of reflexivity in regulation, which may constitute a significant advantage of private law regulation over other potential systems. In section five the doctrine of privity of contract is assessed as both a potential weakness and a strength of contract law in regulating state commercial activity.

In the final section I conclude that exclusively private law regulation is not a viable approach, but that it does hold a number of advantages over other approaches. This conclusion suggests that an optimal approach to the regulation of state commercial activity must include aspects of private law regulation.

## **2 Goals in the regulation of state commercial activity**

The first important question to address in assessing the viability of an exclusively private law or contract law approach to the regulation of state commercial activity is the achievement of specific goals that are imperative in the successful regulation of such activity. I will not attempt to define such goals exhaustively, but will focus on a select number of regulatory goals that are, in my view, relatively uncontroversial and that in combination provide adequate material to test the hypothesis of the exclusively private law approach as an alternative route with results similar to public law regulation. The question here is thus simply whether private law regulation can at least achieve the same substantive regulatory goals as public law regulation in the context of state commercial activity.

### **2.1 Different legal route, same substantive destination**

There are a number of examples from case law where identical, or very similar, substantive results have been achieved via different regulatory routes in the context of state commercial activity.

### 2.1.1 Public employment dismissal cases

One area that effectively illustrates the “different route, similar result” argument is the public employment dismissal cases. As I noted in chapter three,<sup>6</sup> this area has been a significant battlefield in the tug of war between private and public law regulation of state commercial activity. With the goal of protecting individual public employees against unfair dismissal, courts have applied the public law rules of procedural fairness, in particular the *audi alteram partem* rule, in this context.<sup>7</sup> The courts have employed various strategies to subject such state action to public law regulation. However, in *Tshabalala and Others v Minister of Health and Others*<sup>8</sup> Goldstone J found an exclusively private law route to the protection of the dismissed public employees. In that case some 900 student nurses at the Baragwanath Hospital participated in strike action following a dispute with the hospital management.<sup>9</sup> As a direct result the body of student nurses was issued with a notice stating “your services have been terminated as from the 13th of this month. You have 24 hours to vacate your rooms”.<sup>10</sup> Three of the student nurses challenged their dismissals. In reaching his conclusion that the dismissals were improper, Goldstone J followed two distinct routes, one of public law and one of private law, each bringing him to the same result. As far as the public law route is concerned Goldstone J affirmed the familiar rules of procedural fairness and the applicability of such rules in instances where

---

<sup>6</sup> See chapter three at par 3.6.1 and par 3.6.2 above.

<sup>7</sup> *Transnet Ltd and Others v Chirwa* 2007 2 SA 198 (SCA) per Cameron JA for the minority; *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Other* 2006 2 All SA 175 (E); *Ntshotsho v Umtata Municipality* 1998 3 SA 102 (Tk); *Administrator, Transvaal and Another v Sibiya and Another* 1992 4 SA 532 (A); *Administrator, Transvaal and Others v Zenzile and Others* 1991 1 SA 21 (A); *Moodley and Others v Minister of Education and Culture, House of Delegates, and Another* 1989 3 SA 221 (A); *Mokopanele en Andere v Administrateur, Oranje Vrystaat, en Andere* 1989 1 SA 434 (O); *Mokoena and Others v Administrator, Transvaal* 1988 4 SA 912 (W).

<sup>8</sup> 1987 1 SA 513 (W).

<sup>9</sup> *Tshabalala and Others v Minister of Health and Others* 1987 1 SA 513 (W) at 514 – 516.

<sup>10</sup> *Tshabalala and Others v Minister of Health and Others* 1987 1 SA 513 (W) at 519.

rights are adversely affected.<sup>11</sup> Since the student nurses' rights were adversely affected by the dismissals Goldstone J had no trouble in finding that the *audi alteram partem* rules applied. In view of the fact that the hospital administration did not adhere to these rules the dismissals were liable to be set aside.<sup>12</sup> Alternatively to this public law approach Goldstone J also noted a private law approach to achieve the same result. The dismissals amounted to the cancellation of the respective contracts between the hospital and the student nurses. In private law a "decision to terminate a contract must be communicated to the other party."<sup>13</sup> Goldstone J found the general statement of dismissal to the student body, quoted above, not to "clearly or unambiguously" communicate the cancellation of their contracts "to any of the [individual] students."<sup>14</sup> Consequently, and as a matter of contract law, the dismissals were ineffective.

Goldstone J's judgement is remarkable for the fact that he expressly noted both the public and private law routes to his conclusion. The facts of that case, and in particular the nature of the notice terminating the students' contracts, were decisive in opening up the private law route Goldstone J followed. The same reasoning might not be possible in other public dismissal cases, for example where individual notices are given. However, a similar private law perspective, focusing on the contract underlying the public employment, would in many cases yield a similar parallel route to the regulatory goals achieved by the application of public law rules of procedural fairness. This is illustrated by Hoexter JA's judgement in *Administrator, Orange Free State, and Others v Mokopanele and Another*.<sup>15</sup> That case also dealt with the dismissal of striking public sector workers. In response to the strike the state employer issued an ultimatum to the workers stating that disciplinary action would be taken against them if they did not forthwith return to work and that they would be dismissed if they did not return to work the

---

<sup>11</sup> *Tshabalala and Others v Minister of Health and Others* 1987 1 SA 513 (W) at 519.

<sup>12</sup> *Tshabalala and Others v Minister of Health and Others* 1987 1 SA 513 (W) at 520.

<sup>13</sup> *Tshabalala and Others v Minister of Health and Others* 1987 1 SA 513 (W) at 520.

<sup>14</sup> *Tshabalala and Others v Minister of Health and Others* 1987 1 SA 513 (W) at 521.

<sup>15</sup> 1990 3 SA 780 (A).

following day.<sup>16</sup> Although the applicants returned to work the following day they were subsequently dismissed for participating in illegal strike action.<sup>17</sup> In express contrast to the court *a quo* that set aside the dismissals on (public law) procedural fairness grounds,<sup>18</sup> Hoexter JA followed a private law route to dismissing the appeal. He found that the ultimatum issued to the workers amounted to a waiver by the administration of its right to dismiss or to an election by the administration not to exercise its right to dismiss.<sup>19</sup> As a result the purported dismissals were ineffective. The court thus achieved the same substantive protection of the dismissed workers by an application of “the fundamental [private law] principle that a contracting party who has once approbated cannot thereafter reprobate.”<sup>20</sup>

### 2.1.2 Private law rules increasing protection of individuals

The judgement in *Administrator, Orange Free State, and Others v Mokopanele and Another*<sup>21</sup> does not only illustrate the frequent capacity of private law reasoning to yield outcomes similar to public law regulation, but

---

<sup>16</sup> *Administrator, Orange Free State, and Others v Mokopanele and Another* 1990 3 SA 780 (A) at 786.

<sup>17</sup> *Administrator, Orange Free State, and Others v Mokopanele and Another* 1990 3 SA 780 (A) at 786.

<sup>18</sup> *Administrator, Orange Free State, and Others v Mokopanele and Another* 1990 3 SA 780 (A) at 784.

<sup>19</sup> *Administrator, Orange Free State, and Others v Mokopanele and Another* 1990 3 SA 780 (A) at 787.

<sup>20</sup> *Administrator, Orange Free State, and Others v Mokopanele and Another* 1990 3 SA 780 (A) at 787, 788. For similar parallel routes to the same result in the public employment context see *Ntshotsho v Umtata Municipality* 1998 3 SA 102 (Tk) (holding that the condition for the termination of the relevant contract was not fulfilled and the attempted termination of the contract was thus premature and ineffective as a matter of private law as well as procedurally defective in failing to comply with the public law *audi alteram partem* rule and hence also liable to be set aside) and *Administrator, Transvaal and Others v Zenzile and Others* 1991 1 SA 21 (A) at 34 (holding that as an “elementary rule of our law of contract” the public employer could only validly determine the contract following an alleged breach by the employee after it duly enquired “into matters of fact and law” in addition to the public law requirements of procedural fairness).

<sup>21</sup> 1990 3 SA 780 (A).

also illustrates that a private law approach may sometimes provide higher measures of substantive protection of individuals.<sup>22</sup> A ruling based on procedural impropriety, in particular a failure to comply with the *audi alteram partem* rule,<sup>23</sup> would at most have left it open to the public employer to dismiss the employees upon a proper procedure. However, the court's ruling that the public employer waived its right to dismiss the employees or elected not to exercise such right left the reversal of the dismissals unassailable.

The possibility that a private law approach may render higher levels of substantive protection than a public law approach is also illustrated by the judgement in *Minister of Home Affairs and Another v American Ninja IV Partnership and Another*.<sup>24</sup> In that case the applicants participated in a government subsidy scheme in terms of which the state undertook to pay a subsidy to local producers of films once the film has been successfully registered under the scheme.<sup>25</sup> Despite the registration and successful production of the respective films, the state refused to pay the subsidies to the applicants.<sup>26</sup> Nestadt JA found the relationship between the state and each film producer to be a contractual one and labelled it as a commercial transaction.<sup>27</sup> As a result the state's activities were subjected to private law regulation which meant that the applicants could enforce their respective claims against the state.<sup>28</sup> In following the private law route the court avoided

---

<sup>22</sup> The same is true of the private law route in *Ntshotsho v Umtata Municipality* 1998 3 SA 102 (Tk), see note 20 above.

<sup>23</sup> I.e. a judgement such as that of the court a quo, see *Administrator, Orange Free State, and Others v Mokopanele and Another* 1990 3 SA 780 (A) at 784 and the approval of the court a quo's approach in *Administrator, Transvaal and Others v Zenzile and Others* 1991 1 SA 21 (A) at 31 – 32.

<sup>24</sup> 1993 1 SA 257 (A).

<sup>25</sup> *Minister of Home Affairs and Another v American Ninja IV Partnership and Another* 1993 1 SA 257 (A) at 262 – 263.

<sup>26</sup> *Minister of Home Affairs and Another v American Ninja IV Partnership and Another* 1993 1 SA 257 (A) at 266.

<sup>27</sup> *Minister of Home Affairs and Another v American Ninja IV Partnership and Another* 1993 1 SA 257 (A) at 268.

<sup>28</sup> *Minister of Home Affairs and Another v American Ninja IV Partnership and Another* 1993 1 SA 257 (A) at 273.

several obstacles that stood in the way of enforcing the subsidy claims in terms of a public law approach, such as the uncertainty of the doctrine of substantive protection of legitimate expectations and the potential impact of the Exchequer Act.<sup>29</sup> This outcome furthermore stands in stark contrast to other subsidy cases where the public law approach to the state activity under scrutiny left the respective applicants without enforceable claims.<sup>30</sup>

The cases above serve as examples of the basic proposition that private law regulation does not necessarily mean less protection of the individual when interacting with the state. In many instances private law regulation offers equal or even higher levels of protection to the individual, something which is traditionally viewed as the purpose of public law regulation of such instances.<sup>31</sup> However, the binding nature of private law regulation may provide an undesirable obstacle in the way of legitimate state purposes that may detract from its value as a judicial regulatory approach.<sup>32</sup> Having made the general point that private law regulation seems in principle just as capable of protecting individuals as public law regulation, I will now turn to a number of

---

<sup>29</sup> Act 66 of 1975; *Minister of Home Affairs and Another v American Ninja IV Partnership and Another* 1993 1 SA 257 (A) at 263 – 264, 272. See also *S & T Import and Export (Pvt) v Controller of Customs and Excise* 1981 4 SA 196 (ZA) at 201 where the contractual approach to the relevant government incentive scheme adopted by the court allowed the court to severely restrict any discretion on the part of the state in paying out subsidies and to enforce such payment to the individual.

<sup>30</sup> See Bolton (2004) 16 SA Merc LJ 196 at 203 – 209. Such an outcome is especially common in other Commonwealth jurisdictions, such as the UK and Australia. See Arrowsmith *Civil Liability and Public Authorities* 50 – 51 for a discussion of the position in the UK and Seddon *Government Contracts* 84 – 87 where the author discusses a number of Australian and English cases where claims for payment under government subsidy schemes were denied because a private law account of the arrangements under scrutiny were rejected and the public law assessment rendered only weak protection.

<sup>31</sup> Daintith reaches a similar conclusion with regard to English law and notes that “one is struck by the similarity of results obtained by applying, on the one hand, administrative law tests to the exercise of discretionary statutory powers, and on the other hand, common law tests to discretionary contractual powers”: Daintith (1979) 32 *Current Legal Problems* 41 at 58.

<sup>32</sup> I will return to this point in par 3.4 below.

specific regulatory goals in the context of state commercial activity and assess the capacity of private law regulation to adequately achieve such goals.

## **2.2 Goal 1: Controlling power disparity in state commercial activity**

One of the main concerns driving the regulation of any state activity is to shield the individual from the superior power of the state. This is traditionally viewed as one of the central goals of public law in general and administrative law in particular, with the unequal power relationship between its subjects as its point of departure.<sup>33</sup> In the context of state commercial activity the question regarding power disparity between the parties is particularly pertinent. On the one hand, at least one of the parties is an organ of state with inherent superior power. On the other hand, the commercial nature of the activity presumes a relationship of equality and frames the parties' actions against a background context of equality. It is therefore of some importance to assess the ability of private law regulation to address issues of power disparity in state commercial activity.<sup>34</sup>

Cora Hoexter argues cogently that the “fundamental questions” to be asked in state contracting cases are the ones relating to the equality of the parties' respective bargaining powers.<sup>35</sup> These are questions such as “[w]as there something approaching real consensus between the parties?”, “[w]as the public body in a position to dictate the terms?” and “[w]as it in a more powerful position as a result of its being a public body?”<sup>36</sup> In her view

---

<sup>33</sup> See generally chapter one at note 4 and accompanying text above.

<sup>34</sup> That the question of a power disparity between the parties and specifically the use of superior power by the state party to state commercial activity, is of critical importance and thus a central concern of the regulation of that activity also emerges clearly from the most recent developments in the classification approach, where the presence of such superior power has become one of the central criteria to subject the relevant activity to public law regulation, see chapter three at par 3.3 above.

<sup>35</sup> Hoexter (2004) 121 SALJ 595 at 618.

<sup>36</sup> Hoexter (2004) 121 SALJ 595 at 618. In *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) Moseneke DCJ, for the majority, seems to gloss over these fundamental questions regarding unequal bargaining power in a perplexingly accepting fashion, arguing that the disappointed successful tenderer (following the setting aside of the



attempts to classify the relevant state action as administrative action or not are simply distractions from these more fundamental questions. If one accepts Hoexter's arguments, as I do, then the issue is whether the exclusively private law approach, as one alternative to the classification approach, can successfully address these "fundamental questions".

At first blush private law does not seem particularly adept at addressing issues of power disparity. As a point of departure private law and in particular the law of contract operates from the assumption of equality between the parties.<sup>37</sup> When a particular activity or relationship is thus analysed in terms of private law or put differently, as soon as private law regulation is applied to a given instance, the question of the respective bargaining power of the parties seems to have been answered or at least relegated to the background.<sup>38</sup> The possibility of seriously engaging the equality of the

---

tender upon review) in that case should rather look to contractually negotiated risk-allocation than delictual liability as protection against wasted expenses. At par 50 the judge made the generalised statement that "[o]nce the tender is awarded the state and the tenderer are no more than equal contracting parties in an imminent sale." However, in their strong dissent, Langa CJ and O'Regan J, rejected this view and displayed a keen awareness of the power disparity inherent in these situations. At par 89 they stated: "In our view, it is unlikely that government contracts are negotiated in this manner. It seems probable that government contracts of this sort are standard form contracts whose terms are stipulated in advance by government."

<sup>37</sup> This is at least the classical model of contract law: Collins *The Law of Contract* 22 – 23; Lubbe & Murray *Farlam & Hathaway Contract* 21; Hosten *et al Introduction to South African Law and Legal Theory* 597.

<sup>38</sup> It is this perceived effect of applying private law regulation that motivated (at least in part) Streicher JA in *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC 2001 3 SA 1013 (SCA) and Cameron JA in *Logbro Properties CC v Bedderson* NO 2003 2 SA 460 (SCA) to investigate the power relationship between the parties *before* applying private law regulation to the exclusion of public law regulation to the state commercial activity under scrutiny in those cases. Addressing the power disparity (or lack thereof) between the parties *prior* to applying a given set of regulation, in particular private law regulation, reinforces the notion that such issues cannot be addressed *in terms of* private law regulation. See also Hoexter (2004) 121 SALJ 595 at 602, who argues that the majority's classification of the dispute as contractual in *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) "guarantee[d] the court of the presence of all the classical features of a contract: 'We have said that this is a contract, so it must have been entered into voluntarily.'"

relationship by means of the regulation applied is accordingly (so it would seem) severely hampered. This is not, however, an accurate description of the modern law of contract or private law generally. Modern contract law principles present numerous means of addressing power disparity between parties.

### 2.2.1 Rules relating to the conclusion of the transaction

Consensus as the basis of contractual liability already opens up an avenue of addressing power disparity by applying the rules of contract law as regulatory system. Within contract law a number of doctrines have developed to ensure that contractual liability is indeed founded on *consensus ad idem*, a meeting of the minds, or put differently, to regulate cases of “forced consensus”.<sup>39</sup> The most obvious of these are the principles dealing with duress (*metus*) and undue influence.<sup>40</sup> In most cases a valid contract will come into existence despite the duress or undue influence,<sup>41</sup> but such contract may be voidable at the discretion of the weaker party.<sup>42</sup> However, in South African contract law, these principles do not provide particularly strong protection of weaker contracting parties. The quality of the duress or the undue influence brought to bear on the weaker party must be of quite a high level before cancellation

---

<sup>39</sup> “Forced consensus” may sound like a contradiction in terms, but I am simply referring to instances where consent is not freely given.

<sup>40</sup> See generally Van der Merwe *et al Contract: General Principles* 103 – 124; De Wet & Van Wyk *Kontraktereg & Handelsreg* 49 – 53; Lubbe & Murray *Farlam & Hathaway Contract* 362 – 374. Duress that leads to the conclusion of an agreement may also constitute a delict so that the weaker party may have delictual remedies at her disposal should she be able to prove the usual requirements for delictual liability, viz an action that is wrongful accompanied by fault and that is causally linked to damages, see Van der Merwe *et al Contract: General Principles* 104.

<sup>41</sup> It is only in the most extreme cases of duress, where the weaker party is physically forced to conclude the contract (*vis absoluta*), that no contract will come into existence: Van der Merwe *et al Contract: General Principles* 104; De Wet & Van Wyk *Kontraktereg & Handelsreg* 49; Lubbe & Murray *Farlam & Hathaway Contract* 362.

<sup>42</sup> Van der Merwe *et al Contract: General Principles* 120 – 121; De Wet & Van Wyk *Kontraktereg & Handelsreg* 49; Lubbe & Murray *Farlam & Hathaway Contract* 362.

will be possible.<sup>43</sup> South African courts have furthermore generally been reluctant to extend these (or similar) principles to all instances where one party relied on some form of superior power vis-à-vis the counterparty in concluding the contract.<sup>44</sup> The continued reliance on wrongfulness as an essential element in all these instances is indicative of the restricted use of these principles in addressing disparities in bargaining power.<sup>45</sup> Current South African law simply does not allow a party to rescind a contract just because she had inferior bargaining power when concluding such agreement and hence may have entered into an agreement that is not in her best interest or is a “hard bargain”.<sup>46</sup> Much more is required by way of objectionable conduct by the counterparty.<sup>47</sup> As I noted in chapter three<sup>48</sup> the concern regarding the state’s superior power in concluding contracts emerges when the state dictates the terms of the agreement. Such conduct in itself will fall far below the threshold above which contract law doctrines regarding improperly obtained consent operate.

---

<sup>43</sup> *Medscheme Holdings (Pty) Ltd and Another v Bhamjee* 2005 5 SA 339 (SCA) at 343: “[S]ome considerable harm”, 346: “[H]ard bargaining is not the equivalent of duress”; *Paragon Business Forms (Pty) Ltd v Du Preez* 1994 1 SA 434 (SE) at 440: “[I]t is a requirement that there must be a threat of some considerable evil which is imminent or inevitable”; *Ex parte Coetzee et Uxor* 1984 2 SA 363 (W) at 366: “gewetenloosheid” (unconscionability (my translation)); *Patel v Grobbelaar* 1974 1 SA 532 (A) at 534; *Broodryk v Smuts* 1942 TPD 47 at 51: “[C]onsiderable evil”; Van der Merwe *et al Kontraktereg: Algemene Beginsels* 125 talk of an element of unconscionability as indicating the level of “uiterste onbillikheid” (extreme unfairness (my translation)) that is common to these grounds of rescission.

<sup>44</sup> *Medscheme Holdings (Pty) Ltd and Another v Bhamjee* 2005 5 SA 339 (SCA) at 346; *Van den Berg & Kie Rekenkundige Beamptes v Boomprops 1028 BK* 1999 1 SA 780 (T) at 795; Van der Merwe *et al Contract: General Principles* 118 – 120.

<sup>45</sup> See Van der Merwe *et al Contract: General Principles* 118 – 120; Van der Merwe & Van Huyssteen (1987) 50 *THRHR* 78.

<sup>46</sup> *Medscheme Holdings (Pty) Ltd and Another v Bhamjee* 2005 5 SA 339 (SCA) at 346; *Van den Berg & Kie Rekenkundige Beamptes v Boomprops 1028 BK* 1999 1 SA 780 (T) at 792 – 793, 795 – 796; *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 1 SA 398 (A) at 436; Van der Merwe *et al Contract: General Principles* 117; Lubbe & Murray *Farlam & Hathaway Contract* 369.

<sup>47</sup> See De Wet & Van Wyk *Kontraktereg & Handelsreg* 49 – 50; Van der Merwe & Van Huyssteen (1987) 50 *THRHR* 78 at 80.

The general South African contract law principles addressing improperly obtained consent may not at present embody effective regulation of power disparities in instances such as state contracting, but that does not mean that these principles are not *capable* of providing the desired regulation. It may simply mean that those principles require further development. In fact, in South African and comparable legal systems these very principles have already shown considerable promise of developing to address a wider array of concerns regarding improperly obtained consent. Locally the Supreme Court of Appeal recently recognised “commercial bribery” as a ground for repudiating a contract because of defective consensus.<sup>49</sup> As Van der Merwe *et al* argue, this development clearly illustrates that the grounds upon which a contract can be rescinded because of defective consensus are not limited and are open to development.<sup>50</sup> Such development may extend these principles to cases of abuse of superior bargaining power.<sup>51</sup> In English law Lord

---

<sup>48</sup> See chapter three at par 3.3.2.

<sup>49</sup> *Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd* 1999 2 SA 719 (SCA) at 729; see also *Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk* 1986 1 SA 819 (A). This development also illustrates contract law's capacity to address another major concern in the regulation of state commercial activity, viz corruption.

<sup>50</sup> Van der Merwe *et al Contract: General Principles* 116. See also Van Huyssteen *Onbehoorlike Beïnvloeding en Misbruik van Omstandighede in die Suid-Afrikaanse Verbintenisreg* 262 *et seq*; Cockrell (1992) 109 SALJ 40 at 56 – 57.

<sup>51</sup> Van der Merwe *et al Contract: General Principles* 116. But cf *Medscheme Holdings (Pty) Ltd and Another v Bhamjee* 2005 5 SA 339 (SCA) at 346 where the court strongly denied such wider application of these principles and stated: “[I]t is not unlawful, in general, to cause economic harm, or even to cause economic ruin, to another, nor can it generally be unconscionable to do so in a competitive economy. In commercial bargaining the exercise of free will ... is always fettered to some degree by the expectation of gain or the fear of loss ... hard bargaining is not the equivalent of duress, and that is so even where the bargain is the product of an imbalance in bargaining power. Something more ... would need to exist for economic bargaining to be illegitimate or unconscionable and thus to constitute duress” and *Van den Berg & Kie Rekenkundige Beamptes v Boomprops* 1028 BK 1999 1 SA 780 (T) where the court rejected the argument that the financial pressure placed on one of the contracting parties in that case amounted to duress and stated at 795: “Die meeste, indien nie alle besigheidstransaksies nie, gaan egter uit die aard van die saak gepaard met ekonomiese

Denning has also suggested such development, but it has not been general accepted.<sup>52</sup> Case law on improperly obtained consent in South African contract law indicates that despite the conventional reliance on the crystallised categories of misrepresentation, duress, undue influence and (now ostensibly) commercial bribery,<sup>53</sup> there is a general principle against the enforcement of such contracts that may include a wide variety of cases where improper conduct can be established.<sup>54</sup> There are at least two interrelated

---

en finansiële druk” (Economic and financial pressure inevitably accompanies most, if not all business transactions (my translation)).

<sup>52</sup> See Lord Denning MR’s remarks in *Lloyds Bank Ltd v Bundy* [1974] 3 All ER QB 757 at 765: “Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on ‘inequality of bargaining power’. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.” In *National Westminster Bank Plc v Morgan* [1985] 1 All ER 821 at 830 Lord Scarman, however, rejected such a general approach, but did state: “The fact of an unequal bargain will, of course, be a relevant feature in some cases of undue influence”. See Richards *Law of Contract* 271 – 273; Furmston *Cheshire, Fifoot & Furmston’s Law of Contract* 340 – 345; *Van den Berg & Kie Rekenkundige Beambptes v Boomprops* 1028 BK 1999 1 SA 780 (T) at 786 – 787; *Malilang and Others v MV Houde Pearl* 1986 2 SA 714 (A) at 730; SALC *Unreasonable Stipulations in Contracts and the Rectification of Contracts* 23 – 24.

<sup>53</sup> Although the court recognised in *Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd* 1999 2 SA 719 (SCA) at 729 that its use of commercial bribery can be dogmatically classified along with misrepresentation, duress and undue influence as instances of rescission because of improperly obtained consent, it seemed particularly reluctant to simply add commercial bribery to that list. However, Van der Merwe *et al Contract: General Principles* 115 – 116 argue cogently that commercial bribery does indeed represent such a fourth ground for rescission following the court’s judgement, especially when read against the more general approach in *Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk* 1986 1 SA 819 (A).

<sup>54</sup> Van der Merwe *et al Contract: General Principles* 116 – 120; Cockrell (1992) 109 SALJ 40 at 56 – 57; Van der Merwe & Van Huyssteen (1987) 50 THRHR 78. See *BOE Bank Bpk v Van Zyl* 2002 5 SA 165 (C) at 183, where the court denied the existence of such general ground, but made some positive remarks regarding the movement in South African law towards the development of such a general ground: “[D]ie teoretiese grondslag waarop die geleerde skrywers hulle voorstel vir 'n enkele oorkoepelende aanvegtingsgrond fundeer,

avenues open here that leaves scope for the development of the desired regulation of the state's superior bargaining power by means of the contract law principles pertaining to improperly obtained consent.

The first of these options is the focus on the impropriety of the conduct of one of the parties. In cases such as *Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk*<sup>55</sup> and *Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd*<sup>56</sup> the courts highlighted their (and by extension the law's) abhorrence of the conduct under scrutiny.<sup>57</sup> In the former case in particular the court noted that it was this unconscionability of the method used in concluding the contract that led to the contract being voidable.<sup>58</sup> It seems to me that there is enough room in this focus on the "ongoorloofdheid van die metode"<sup>59</sup> to read public law like principles of procedural fairness into specific instances of contracting should a court wish to do so. It simply depends on what the court views as the appropriate method to be followed in the given instance.<sup>60</sup> This brings me to the second avenue, which is located in the *boni mores* as

---

[blyk] nouliks aanvegbaar te wees" (The theoretical grounds upon which the learned writers base their suggestion for a single overarching ground for rescission, can hardly be contested (my translation)). See also Griesel J's remarks in the court *a quo* to the same effect: *BOE Bank Bpk v Van Zyl* 1999 3 SA 813 (C) at 824 and the same judge's remark in *Barnard v Barnard* 2000 3 SA 741 (C) at 753 – 754: "[W]here a contract has been induced by fraud, duress, undue influence or similar circumstances it would be contrary to public policy to enforce such a contract" (my emphasis).

<sup>55</sup> 1986 1 SA 819 (A) at 848.

<sup>56</sup> 1999 2 SA 719 (SCA) at 728 – 729.

<sup>57</sup> In both instances bribery.

<sup>58</sup> *Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk* 1986 1 SA 819 (A) at 848: "[D]ie ...reg om die ooreenkoms te verwerp, [is] gegrond ... op die ongoorloofdheid van die metode ... waarvan die ander party gebruik gemaak het" (The right to rescind the contract is based on the illegality of the method used by the other party (my translation)). Quoted with approval in *Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd* 1999 2 SA 719 (SCA) at 728. See also Van der Merwe & Van Huyssteen (1987) 50 *THRHR* 78 at 79.

<sup>59</sup> Illegality of the method (my translation).

<sup>60</sup> I am of course not suggesting that the courts have free rein to introduce procedural requirements for contracting into individual cases where it suits them, or that courts should do so. I am suggesting doctrinal development along the lines that led to the recognition of commercial bribery as a ground for the rescission of a contract.

guiding principle to determine what conduct is acceptable in any given instance. In assessing whether specific action amounts to an improper obtaining of consent, South African courts have recourse to the *boni mores* as touchstone.<sup>61</sup> There can be no doubt that the *boni mores* in South Africa must be interpreted in the context of relevant provisions of the Constitution.<sup>62</sup> When a court is therefore assessing the propriety of state conduct in contractual settings against the measure of the *boni mores*, constitutional standards such as those found in sections 195 and 217 are of obvious relevance. Section 195(1) obliges the public administration<sup>63</sup> to adhere to “the democratic values and principles enshrined in the Constitution” and continues to enumerate a (non-exhaustive) list of values or standards that the public administration must adhere to in all instances. These include principles such

---

<sup>61</sup> See *Broodryk v Smuts* 1942 TPD 47 at 52; *BOE Bank Bpk v Van Zyl* 2002 5 SA 165 (C) at 179 – 180; *BOE Bank Bpk v Van Zyl* 1999 3 SA 813 (C) at 826; *Van den Berg & Kie Rekenkundige Beamptes v Boomprops* 1028 BK 1999 1 SA 780 (T) at 795; *Benkenstein v Neisius and Others* 1997 4 SA 835 (C) at 845; *Machanick Steel & Fencing (Pty) Ltd v Wesrhodan (Pty) Ltd*; *Machanick Steel & Fencing (Pty) Ltd v Transvaal Cold Rolling (Pty) Ltd* 1979 1 SA 265 (W) at 271 – 273 and the cases discussed there; *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 1 SA 298 (C) at 306; *Van der Merwe et al Contract: General Principles* 117; *Lubbe & Murray Farlam & Hathaway Contract* 362 – 363; *Van Huyssteen Onbehoorlike Beïnvloeding en Misbruik van Omstandighede in die Suid-Afrikaanse Verbintenisreg* 255.

<sup>62</sup> The *boni mores* represent the (legal) values of the community, see *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 41: “The *boni mores* is a value judgment that embraces all the relevant facts, the sense of justice of the community and considerations of legal policy. Both of which now derive from the values of the Constitution”; *BOE Bank Bpk v Van Zyl* 2002 5 SA 165 (C) at par 51: “[R]egsgevoel van die gemeenskap” (the legal conviction of society (my translation)). In South Africa these values are (at a most basic level) reflected in the Constitution, see the Preamble and s 1; cf *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) at par 18, 28; *Brisley v Drotzky* 2002 4 SA 1 (SCA) at par 91 (per Cameron JA): “In its modern guise, ‘public policy’ is now rooted in our Constitution and the fundamental values it enshrines.” S 39(2) of the Constitution also expressly enjoins courts to “promote the spirit, purport and objects of the Bill of Rights” whenever developing the common law.

<sup>63</sup> “Public administration” as used here includes the administration in every sphere of government, organs of state and public enterprises, see s 195(2).

as transparency,<sup>64</sup> accountability,<sup>65</sup> fairness<sup>66</sup> and “a high standard of professional ethics.”<sup>67</sup> Section 217(1) specifically requires organs of state to act in a fair, equitable and transparent manner when contracting for goods or services. These sections illustrate a clear stance on the part of the South African society regarding the standard of conduct required of the state, even when engaging in commercial activity. The *boni mores* clearly require a higher standard of the state in such instances than of other commercial players. Negotiating a hard bargain that “is the product of an imbalance in bargaining power”<sup>68</sup> cannot be said to fall within this higher standard.<sup>69</sup>

---

<sup>64</sup> Section 195(1)(g).

<sup>65</sup> Section 195(1)(f).

<sup>66</sup> With specific reference to service delivery, see s 195(1)(d).

<sup>67</sup> Section 195(1)(a).

<sup>68</sup> *Medscheme Holdings (Pty) Ltd and Another v Bhamjee* 2005 5 SA 339 (SCA) at 346.

<sup>69</sup> Although the focus of contract law rules governing improperly obtained consent is exclusively on procedural impropriety, so that a party may be able to cancel a contract on the grounds of improperly obtained consent even where the contract is substantively to her advantage, the regulatory concern at issue here is the *abuse* by the state of its superior power. It follows that my purpose is to assess whether contract law rules can assist a private party in the specific circumstances where the state, using its superior power, concluded a transaction with that private party that is substantively to her disadvantage. The above analysis, using constitutional provisions to inform contract law rules on improperly obtained consent, may yield different results when applied to circumstances where the state used its superior power to the private counterparty's substantive benefit. However, this is a question that I do not wish to engage in here. See in this regard Cockrell (1992) 109 SALJ 40 at 59, who notes: “[T]he distinction between ‘process’ and ‘substance’ is not watertight, for it seems undeniable that the courts’ willingness to set aside contracts on the basis of misrepresentation, duress and undue influence is often triggered by an awareness of the substantive unfairness of the resulting bargain.” The above conclusion is not to suggest that the result (at least on the duress aspect of the case) would be radically different than the one reached in *Medscheme Holdings (Pty) Ltd and Another v Bhamjee* 2005 5 SA 339 (SCA) should this higher standard be applied to similar facts involving the state. However, the reasoning would be different. If one were to imagine that the appellant in that case was an organ of state (something which is not that difficult to imagine since Medscheme Holdings, the actual appellant in the case, acted as service provider to the medical aid schemes of Sasol, a previously wholly state owned enterprise in which the state (through various organs) continues to hold considerable interest), what would this higher standard have required of that state party? Put in another way, what would the appellant have had to do differently from



Through the standard of the *boni mores* there is ample room for the development of contract law principles governing improperly obtained consent to effectively regulate the concern about power disparity in cases where the state is involved.

### **2.2.2 Rules relating to the content of the transaction**

Whereas the principles regarding improperly obtained consent, discussed above,<sup>70</sup> can be brought into line with fairness requirements aimed at the procedure of the state activity, there are also a number of contract law principles that focus on the content of the transaction and that can regulate power disparity on a substantive level. These principles are of particular importance in the current context since the concern regarding the state's superior power largely flows from its ability to dictate the terms of the

---

what it did? I would suggest that, based on the higher standard, probably nothing. The higher standard would arguably place additional procedural requirements on the state party in concluding the contract, along the lines of administrative law procedural fairness requirements, in order to protect the counterparty against abuse of the state's superior power. In the instant case, the appellant did in fact engage in extensive procedures before entering into the challenged contracts. It met with the counterparty, Bhamjee, on several occasions, provided him with all the information that the appellant relied upon, afforded him the opportunity to make representations and eventually made a decision (to conclude the contract with Bhamjee) based on all the relevant considerations. On the facts, the contract concluded can also not be said to have been an unreasonable one, whether judged on a rationality basis or on the stricter proportionality test. From all of this, the court would, in such a hypothetical case involving the state, come to the conclusion that the state did in fact act in a proper fashion and thus did not improperly obtain the consent of the counterparty, resulting in an enforceable contract. The difference in reasoning between the actual judgement (see note 51 above) and the hypothetical one just postulated is evident. I think that difference is significant, because the latter approach would allow the court to match "the results in a case to its true merits" without unduly formalistic reasoning, as Cora Hoexter would have it, see Hoexter (2004) 121 *SALJ* 595 at 609. It illustrates that existing private law doctrine *may* be capable of reaching such outcomes and hence addressing the real concerns in such instances.

<sup>70</sup> See par 2.2.1 above.

agreement, in other words, prescribe the substantive content of the transaction.<sup>71</sup>

In South African law the most prominent principle addressing the substantive fairness of a transaction is the requirement of legality based on public policy grounds as developed in key judgements such as *Magna Alloys and Research SA (Pty) Ltd v Ellis*<sup>72</sup> and *Sasfin (Pty) Ltd v Beukes*.<sup>73</sup> The basic principle is that the courts will not enforce a contract that is viewed as contrary to public policy.<sup>74</sup> In *Sasfin (Pty) Ltd v Beukes*<sup>75</sup> the court refused to enforce an agreement because it found the terms of the agreement contrary to public policy to the extent that those terms exploited one party to the exclusive benefit of the other party.<sup>76</sup> What makes this judgement noteworthy is the fact that it was the one-sided nature of the *content* of the agreement that lead to its voidness. It follows that the legality principle allows a court to

---

<sup>71</sup> See note 48 and accompanying text above and chapter three at par 3.3.2.

<sup>72</sup> 1984 4 SA 874 (A).

<sup>73</sup> 1989 1 SA 1 (A).

<sup>74</sup> *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 4 SA 874 (A) at 891; *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) at 7; Olivier *Die Grondslag van Kontraktuele Gebondenheid* 436 *et seq.*

<sup>75</sup> 1989 1 SA 1 (A).

<sup>76</sup> *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) at 10: “[I]t [the contract] sought to ensure maximum protection of Sasfin’s rights while at the same time subjecting Beukes to the most stringent burdens and restrictions,” at 13: “As a result [of the contract] Beukes could effectively be deprived of his income and means of support for himself and his family. He would, to that extent, virtually be relegated to the position of a slave, working for the benefit of Sasfin (or, for that matter, any of the other creditors). What is more, this situation could, in terms of clause 3.14, have continued indefinitely at the pleasure of Sasfin (or the other creditors). Beukes was powerless to bring it to an end ... An agreement having this effect is clearly unconscionable and incompatible with the public interest, and therefore contrary to public policy ... This manifestly constitutes exploitation of Beukes to a degree which, in the public interest, cannot be countenanced. The provisions of these clauses are therefore also contrary to public policy” and at 15: “The iniquity of the situation is immediately apparent. It is grossly exploitive of Beukes and must inevitably offend against the mores of the public to such an extent that it should be struck down on the grounds of public policy.” See also Olivier *Die Grondslag van Kontraktuele Gebondenheid* 443 – 445 and Lubbe (1990) 1 *Stell LR* 7 for concise discussions of this judgement.

regulate unequal bargaining power where such disparity is manifested in the terms of the agreement. It should, however, immediately also be noted that a court will not easily invalidate a contract on these grounds.<sup>77</sup> As is the case with the principles regarding improperly obtained consent, this general legality principle will thus only counter the most extreme cases of disparity.

However, similar to the principles discussed in paragraph 2.2.1 above, the legality principle can be developed towards more effective (and comprehensive) regulation of power disparity in state contracting cases. There are at least three strands to legality in contract law that support such potential development. Firstly, public policy is an open-ended concept<sup>78</sup> and the way in which it is ascertained under the legality enquiry allows for a higher degree of substantive control of the content of state contracts. Although public policy and the *boni mores* are at times treated as separate (and alternative) aspects of the legality requirement,<sup>79</sup> it emerges from the case law that these concepts are mostly used interchangeably or at the very least that

---

<sup>77</sup> In *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) the court stated at 9: “The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power.” See also *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) at par 8; *Brisley v Drotosky* 2002 4 SA 1 (SCA) at par 31; *De Beer v Keyser and Others* 2002 1 SA 827 (SCA) at 837; *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere* 1999 3 SA 389 (SCA) at 419 – 420: “Openbare beleid, gegrond op die openbare belang, is g'n juridiese doepa nie” (Public policy, based on public interest, is no juridical magic potion (my translation)); *Venter and Others v Credit Guarantee Insurance Corporation of Africa Ltd and Another* 1996 3 SA 966 (A) at 976; *Botha (now Griessel) and Another v Finanscredit (Pty) Ltd* 1989 3 SA 773 (A) at 783; Olivier *Die Grondslag van Kontraktuele Gebondenheid* 438; Lubbe (1990) 1 *Stell LR* 7 at 12 – 13.

<sup>78</sup> See *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) at par 28; *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) at 8; *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 4 SA 874 (A) at 891; Lubbe (1990) 1 *Stell LR* 7 at 11 – 12 and also the references there in note 37.

<sup>79</sup> See *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* 1988 3 SA 580 (A) at 615 (minority judgement of Jansen JA); De Wet & Van Wyk *Kontraktereg & Handelsreg* 89; Van der Merwe *et al Contract: General Principles* 176 – 178; Olivier *Die Grondslag van Kontraktuele Gebondenheid* 447; Lubbe (1990) 1 *Stell LR* 7 at 11.

the *boni mores* play a decisive role as a measure of public policy.<sup>80</sup> It follows that the arguments above regarding the development of the principles pertaining to improperly obtained consent by means of the constitutional impact on the *boni mores*<sup>81</sup> also apply here. Recent judicial pronouncements on public policy in contract law in fact relied on the Constitution to ascertain the content of that concept.<sup>82</sup> Against this background it is feasible that a court may interpret public policy as requiring stricter scrutiny of the substantive equality and fairness of contractual content where the state is involved based on constitutional provisions such as sections 195 and 217.

A second promising strand to the legality requirement in contract law is evident in the development of specific rules governing agreements in restraint of trade. In the important judgement in *Magna Alloys and Research SA (Pty)*

---

<sup>80</sup> *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) at 8: “That the principles underlying contracts contrary to public policy and *contra bonos mores* may overlap also appears from the judgment of this Court in *Ismail v Ismail* 1983 (1) SA 1006 (A) at 1025G. These classifications may not be of importance in principle, for where a court refuses to enforce a contract it ultimately so decides on the basis of public policy”; *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere* 1999 3 SA 389 (SCA) at 402: “[D]ie feit dat die appellant in sy besonderhede van vordering beweer het dat die verkoping *contra bonos mores* was, maar betoog het dat dit teen die openbare belang was, [is] van geen belang nie” (The fact that the appellant averred in his particulars of claim that the sale was *contra bonos mores*, but in argument asserted that it was against public policy, is of no consequence (my translation)); *Venter and Others v Credit Guarantee Insurance Corporation of Africa Ltd and Another* 1996 3 SA 966 (A) at 976 – 977; *Reeves and Another v Marfield Insurance Brokers CC and Another* 1996 3 SA 766 (A) at 775; *Mufamadi and Others v Dorbyl Finance (Pty) Ltd* 1996 1 SA 799 (A) at 805; *Ex Parte Minister of Justice: In Re Nedbank Ltd v Abstein Distributors (Pty) Ltd and Others and Donnelly v Barclays National Bank Ltd* 1995 3 SA 1 (A) at 20 – 22; *Ocean Diners (Pty) Ltd v Golden Hill Construction CC* 1993 3 SA 331 (A) at 342. See also Du Plessis *Die Begrippe Openbare Beleid en Openbare Belang as Kriterium vir Kontraktuele Geregtigheid* 100 – 108; Lubbe (1990) 1 *Stell LR* 7 at 11.

<sup>81</sup> See notes 61 to 69 and accompanying text above.

<sup>82</sup> This is most evident in the recent jurisprudence regarding *parate executie* clauses, see *Bock and Others v Duburoro Investments (Pty) Ltd* 2004 2 SA 242 (SCA) and the cases cited there. See also *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA); *Brisley v Drotzky* 2002 4 SA 1 (SCA) at par 91 – 92 (concurring judgement of Cameron JA); Naudé & Lubbe (2005) 122 *SALJ* 441 at 452.

*Ltd v Ellis*<sup>83</sup> the court ruled that although Roman Dutch law did not contain any specific rules rendering restraint of trade agreements unenforceable, it was not necessary for South African courts to have recourse to English law in order to regulate such agreements.<sup>84</sup> The doctrinal tools to achieve such regulation already existed in South African law in the form of the legality requirement based on public policy considerations. The court ruled that restraints of trade that were contrary to public policy would be unenforceable on the familiar legality principle.<sup>85</sup> Important for present purposes is the test adopted by the court to ascertain whether a specific restraint is against public policy and hence unenforceable. In this regard the court stated:

In die algemeen kan ... aanvaar word ... dat 'n beperking van 'n persoon se handelsvryheid wat onredelik is, waarskynlik ook die openbare belang sou skaad indien die betrokke persoon daaraan gebonde gehou sou word.<sup>86</sup>

With this formulation the court confirmed reasonableness as the test for the enforceability of agreements in restraint of trade.<sup>87</sup> In assessing the

---

<sup>83</sup> 1984 4 SA 874 (A).

<sup>84</sup> *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 4 SA 874 (A) at 891; *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA) at par 10; Van der Merwe *et al Contract: General Principles* 197.

<sup>85</sup> The court argued that it was the public's interest in allowing every person the freedom to participate in commercial life, freedom to trade, that rendered public policy an appropriate yardstick for the enforceability of restraints of trade, *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 4 SA 874 (A) at 891. See also Olivier *Die Grondslag van Kontraktuele Gebondenheid* 439 – 442; Van der Merwe *et al Contract: General Principles* 197 – 200 for concise discussions of the case focusing on the public policy aspect of it.

<sup>86</sup> *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 4 SA 874 (A) at 894 (In general it can be accepted that a restraint of a person's freedom of trade that is unreasonable will probable also be contrary to the public interest should that person be held to the restraint (my translation)).

<sup>87</sup> *Basson v Chilwan and Others* 1993 3 SA 742 (A) at 767; *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 1 SA 537 (A) at 540 – 541; *Sunshine Records (Pty) Ltd v Frohling and Others* 1990 4 SA 782 (A) at 794. See also Van der Merwe *et al Contract: General Principles* 197; Lubbe (1990) 1 *Stell LR* 7 at 13. Although the court thus expressly moved away from the English law influence on restraints of trade in South Africa, it retained in

reasonableness of the restraint the court will take into account not only the substantive provisions of the contract itself, but also surrounding circumstances. Relevant factors are the interests being protected by the party wishing to enforce the restraint and its legitimacy weighed against the counterparty's interest to freely participate in commerce,<sup>88</sup> the relationship between the parties at all relevant times, including when entering into the agreement,<sup>89</sup> the scope of the restraint in time, geographical area and subject matter<sup>90</sup> and the parties' motives in entering into the restraint agreement.<sup>91</sup> This development relating to restraints of trade illustrates the capacity of the legality principle, using public policy as touchstone, to apply fairly far-reaching substantive reasonableness standards to a contractual arrangement.<sup>92</sup> With

---

essence the reasonableness test employed in English law to establish the validity of such restraints as is evident from later judgements: Sutherland 1990 *TSAR* 675 at 677.

<sup>88</sup> *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA) at par 15, 16; *CTP Ltd and Others v Argus Holdings Ltd and Another* 1995 4 SA 774 (A) at 784; *Basson v Chilwan and Others* 1993 3 SA 742 (A) at 767; *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 1 SA 537 (A) at 541; *Sunshine Records (Pty) Ltd v Frohling and Others* 1990 4 SA 782 (A) at 794; *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 4 SA 874 (A) at 905; Van der Merwe *et al Contract: General Principles* 197.

<sup>89</sup> *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA) at par 16; *Basson v Chilwan and Others* 1993 3 SA 742 (A) at 768; *Sunshine Records (Pty) Ltd v Frohling and Others* 1990 4 SA 782 (A) at 796; Van der Merwe *et al Contract: General Principles* 198 – 199. This would include the relative bargaining power of the parties.

<sup>90</sup> *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA) at par 16; *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 1 SA 537 (A) at 544; *Sunshine Records (Pty) Ltd v Frohling and Others* 1990 4 SA 782 (A) at 794; *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 4 SA 874 (A) at 905; Van der Merwe *et al Contract: General Principles* 198.

<sup>91</sup> *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA) at par 16; *Sunshine Records (Pty) Ltd v Frohling and Others* 1990 4 SA 782 (A) at 796 – 797.

<sup>92</sup> In *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA) at par 17 Malan AJA expressly noted the concurrence of the common law approach developed in relation to restraints of trade with the constitutional approach towards the balancing of various interests using reasonableness as standard. The judge went further and acknowledged proportionality, arguably the most far-reaching standard of substantive reasonableness, as part of the common law test. For an analysis of the matter in *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) along similar lines as advanced in the text above, see Lubbe (1990) 1 *Stell LR* 6 at 21 – 22.

an appropriate contact point to public policy<sup>93</sup> there is no reason why a similar approach cannot be applied to state contracting. As argued above, there is much in the Constitution that may provide such link to public policy.

The third feature of the illegality rule in South African contract law that shows promise regarding its potential use as an instrument to regulate power disparity in state contracting flows from some recent remarks by the Supreme Court of Appeal regarding inequality of bargaining power as a directly relevant factor in assessing public policy. In *Afrox Healthcare Bpk v Strydom*<sup>94</sup> the court remarked:

[D]it [spreek] eintlik vanself dat 'n ongelykheid in die bedingingsmag van die partye tot 'n kontrak op sigself nie die afleiding regverdig dat 'n kontraksbeding wat tot voordeel van die 'sterker' party is, noodwendig teen die openbare belang sal wees nie. Terselfdertyd moet aanvaar word dat ongelyke bedingingsmag wel 'n faktor is wat, tesame met ander faktore, by oorweging van die openbare belang 'n rol kan speel.

The respondent in that case, who sought to invalidate contractual provisions on public policy grounds, did not, however, put any evidence before the court indicating any inequality of bargaining power.<sup>95</sup> Consequently, the court did not pursue this line of reasoning any further.<sup>96</sup> In its later judgement in *Juglal*

---

See also Van der Merwe & Lubbe (1991) 2 *Stell LR* 91 at 96 – 97 for similar arguments in relation to a number of contract cases dealing with public policy.

<sup>93</sup> Such as freedom to trade in the restraint of trade context.

<sup>94</sup> 2002 6 SA 21 (SCA) at par 12 (It is essentially self-evident that a disparity in bargaining power between the parties to the contract in itself cannot justify the conclusion that a term, which is to the advantage of the 'stronger' party, is necessarily against public interest. At the same time it must be accepted that a disparity in bargaining power is a factor that, along with other factors, may play a role in considering public interest (my translation)).

<sup>95</sup> *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) at par 12.

<sup>96</sup> Naudé & Lubbe (2005) 122 *SALJ* 441 at 461 criticise the judgement for dismissing the argument based on inequality of bargaining power "all too quick." They continue to show that there are good arguments why a patient contracting with a hospital upon admission does in fact contract from a position of inferior bargaining power. See also Barnard *A Critical Legal Argument for Contractual Justice in the South African Law of Contract* 187.

*NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division*<sup>97</sup> the court affirmed that “objective circumstances of [the contract’s] conclusion” may be relevant in an assessment of whether such contract is contrary to public policy.<sup>98</sup> In applying this approach to the case at hand, the court expressly noted that the equality of bargaining power between the parties was a relevant factor.<sup>99</sup> These two judgements, along with the ones on restraint of trade quoted above, illustrate that the legality principle, with public policy as yardstick, can be an effective tool in addressing power disparity at both the substantive and procedural levels.<sup>100</sup>

### 2.2.3 Private law treatment of standard-form contracts

In *Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affairs*<sup>101</sup> Eksteen JA, in assessing the nature of a statutory prospecting lease, stated:

The fact that the Act expressly requires certain matters to be dealt with in the lease, and in some instances gives the Minister an overriding say in determining certain terms, does not, in my view, detract from the contractual nature of the lease. After all much the same circumstances pertain to numerous commercial agreements, more particularly when an individual contracts with a large corporation and is presented with a printed form of

---

<sup>97</sup> 2004 5 SA 248 (SCA).

<sup>98</sup> *Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 5 SA 248 (SCA) at par 13.

<sup>99</sup> *Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 5 SA 248 (SCA) at par 16.

<sup>100</sup> For criticism of such a fusion of the procedural and substantive dimensions of contractual fairness, see Lubbe (1990) 1 *Stell LR* 7 at 22 – 23. He argues that there is a “sistematiese beswaar” (structural objection (my translation)) against such fusion under the auspices of public policy as yardstick for the legality requirement since procedural questions, ie questions regarding the parties’ relationship when entering into the contract, are traditionally dealt with under the grounds of rescission as part of the consensus requirement in South African contract law.

<sup>101</sup> 1991 4 SA 718 (A).



agreement. The mere fact that the individual may not readily be able to procure the alteration of any of the terms does not detract from the fact that his acceptance of those terms would lead to a binding contract being concluded. I am therefore of the view that a prospecting lease in terms of the Act must be seen as a consensual agreement between the Minister and the leaseholder...<sup>102</sup>

The equation in this judgement of the state's (statutory) superior power with that of any powerful private market player using standard form contracts illustrates that superior bargaining power or power disparity in contracting is not a matter that is restricted to instances of state contracting. It is clearly a phenomenon of wider impact and one that (at least in the view of the Appellate Division) does not stand in the way of valid, enforceable contracts. This perspective is significant for the present analysis since it allows one to assess the response of contract law to this general phenomenon in order to ascertain that system's capacity meaningfully to respond to concerns regarding power disparity in state commercial activity.<sup>103</sup>

Standard-form contracts and unfair terms often associated with such contracts<sup>104</sup> have not been a major concern of South African courts.<sup>105</sup> These

---

<sup>102</sup> *Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affairs* 1991 4 SA 718 (A) at 724.

<sup>103</sup> Also note Lord Diplock's remarks in *Macaulay v Schroeder Publishing Co Ltd* [1974] 1 WLR 1308 at 1316: "The terms of this kind of standard form contract have not been the subject of negotiation between the parties to it, or approved by any organization representing the interests of the weaker party. They have been dictated by that party whose bargaining power, either exercised alone or in conjunction with others providing similar goods and services, enables him to say: 'If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it.' To be in a position to adopt this attitude toward a party desirous of entering into a contract to obtain goods or services provides a classic instance of superior bargaining power."

<sup>104</sup> Unfair terms are not only found in standard-form contracts with the result that a concern regarding unfair terms is not restricted to standard-form contracts. Likewise, standard-form contracts are not simply collections of unfair terms and not all standard-form contracts necessarily contain unfair terms. However, there is a logical link between concerns regarding unfair terms and standard-form contracts. The one-sided nature of the conclusion of a

contracts are enforced in terms of South African common law as any other contract and very little special arrangements exist to guard against abuse in such instances.<sup>106</sup> Kevin Hopkins argues that the regular enforcement of contracts in instances of “overwhelming” disparity of power is perhaps the best illustration of “private law’s endorsement of inequality.”<sup>107</sup> Along similar lines, although somewhat more constrained, Lubbe & Murray argue that consumer protection legislation such as the Credit Agreements Act,<sup>108</sup> the Alienation of Lands Act<sup>109</sup> and the Usury Act<sup>110</sup> may be viewed as intervention in instances “where courts were seen to be responding inadequately to the

---

standard-form contract lends itself to the inclusion of terms in such agreements that are substantively also one-sided, ie only aimed at the benefit of the drafting party to the detriment of the counter-party.

<sup>105</sup> Aronstam *Consumer Protection, Freedom of Contract and the Law* 184 notes: “South African courts are extremely reluctant to extend the principles of the common law to vest themselves with a jurisdiction based on principles of equity to deal with problems caused by unconscionable contractual conduct.”

<sup>106</sup> There are, however, a number of general contract law rules that may provide protection in specific cases. Examples of such rules may be the *contra proferentem* maxim in interpretation of contracts; the (sporadic) narrow interpretation of exclusion or exemption clauses, the rules relating to *justus error* and notice requirements in the so-called ticket cases, see eg *Brink v Humphries & Jewell (Pty) Ltd* 2005 2 SA 419 (SCA); *Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v Government of The United Kingdom* 2003 5 SA 180 (SCA); *Van der Westhuizen v Arnold* 2002 6 SA 453 (SCA); *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 1 SA 982 (SCA); *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 1 SA 303 (A); *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 2 SA 794 (A); *Cairns (Pty) Ltd v Playdon & Co Ltd* 1948 3 SA 99 (A) at 121 – 123. Public policy considerations ito the legality requirement and the rules regarding improperly obtained consent may of course also provide some protection in these instances where the relatively high threshold for the application of these rules are met, see par 2.2.1 and par 2.2.2 above. See also Naudé & Lubbe (2005) 122 SALJ 441 at 442 – 443 with specific regard to exemption clauses. Despite the potential protection provided by these diverse rules, South African contract law does not seem to present a coherent and direct response to the specific concerns regarding unfair contract terms and in particular in relation to standard-form contracts.

<sup>107</sup> Hopkins 2003 TSAR 150 at 152 – 153.

<sup>108</sup> Act 75 of 1980.

<sup>109</sup> Act 68 of 1981.

<sup>110</sup> Act 73 of 1968.

needs of the community.”<sup>111</sup> This view is echoed in the South African Law Commission’s 1998 final report, *Unreasonable Stipulations in Contracts and the Rectification of Contracts*, where it states that if legislative measures against unfair or unconscionable terms are not introduced,

South Africa would ... become the exception and its law of contract would be deficient in comparison with those countries which recognise and require compliance with the principle of good faith in contracts.<sup>112</sup>

Following its extensive investigation into South African contract law’s response to unfair contract terms, the South African Law Commission concluded that the only viable route to address concerns regarding such terms is the legislative one.<sup>113</sup> It accordingly proposed draft legislation in this regard to the Minister of Justice.<sup>114</sup> Almost ten years later there has been no move towards enacting such legislation and one must accordingly agree with Olivier that the future for such legislative intervention is not rosy.<sup>115</sup>

The one route that may have enabled the common law to effectively guard against unfair terms flowing from standard-form contracts, the *exceptio doli generalis*, was unceremoniously expelled from South African law in the much criticised judgement in *Bank of Lisbon and South Africa Ltd v De Ornelas and Another*.<sup>116</sup> In his dissenting judgement, arguing for the retention

---

<sup>111</sup> Lubbe & Murray *Farlam & Hathaway Contract* 26. See also Zimmermann in Zimmermann & Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* 256.

<sup>112</sup> SALC *Unreasonable Stipulations in Contracts and the Rectification of Contracts* xiv, 59.

<sup>113</sup> SALC *Unreasonable Stipulations in Contracts and the Rectification of Contracts* 59.

<sup>114</sup> SALC *Unreasonable Stipulations in Contracts and the Rectification of Contracts* 60, 208 – 218. It is of interest to note that the SALC’s draft expressly applied to the state, see s 3(4) of the draft on 214 of the report.

<sup>115</sup> Olivier *Die Grondslag van Kontraktuele Gebondenheid* 436. See also Naudé & Lubbe (2005) 122 SALJ 441.

<sup>116</sup> 1988 3 SA 580 (A). For criticism of this judgement see SALC *Unreasonable Stipulations in Contracts and the Rectification of Contracts* 8; Zimmermann in Zimmermann & Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* 255 – 257, 260; Zimmermann (1992) 3 *Stell LR* 5; Cockrell (1992) 109 SALJ 40 at 59; Lewis (1990) 107 SALJ 26; Lubbe (1990) 1 *Stell LR* 7 at 19; Erasmus (1989) 106 SALJ 666 at 674 – 677; Van der Merwe, Lubbe & Van Huyssteen (1989) 106 SALJ 235; Hawthorne & Thomas (1989) 22 *De Jure* 143;

of the *exceptio doli*, Jansen JA expressly pointed to “unequal bargaining power and the large-scale use of standard form contracts” as incentives for questioning any absolute adherence to “freedom of contract and *pacta servanda sunt*” and hence the retention (and extension) of methods to temper such absolute notions in our law.<sup>117</sup> These arguments did not, however, impress the majority of the court.<sup>118</sup> Since this judgement a number of commentators have expressed their agreement with Jansen JA’s sentiment. Louise Tager, in reaction to the judgement, asks: “What remedy is there for those at the mercy of standard form contracts where the terms are often reduced to print of a microscopic size?”<sup>119</sup> As Jansen JA argued, the removal of the *exceptio doli generalis* left a void in this regard in South African law.<sup>120</sup>

The courts’ accommodating attitude towards standard-form contracts and the potentially unfair terms that are often found in them is illustrated by the following remarks of Friedman JP in *Paltex Dyehouse (Pty) Ltd and Another v Union Spinning Mills (Pty) Ltd*:<sup>121</sup>

It is clear that there exists a dialectical tension between freedom of contract and the rights and protection of customers ... This tension also flows from a painful awareness that hard bargains

---

Lubbe & Murray *Farlam & Hathaway Contract* 391; Kerr *The Principles of the Law of Contract* 641 – 666.

<sup>117</sup> *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* 1988 3 SA 580 (A) at 613. Jansen JA (at 617) also noted the following relevant factors in justifying an application of the *exceptio doli*: “[T]he respondents ... had no equal bargaining power with the Bank; standard forms with standard terms were used by the Bank; [and] the Bank stipulated for security far beyond its needs.”

<sup>118</sup> *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* 1988 3 SA 580 (A) at 609. Cockrell (1992) 109 SALJ 40 at 44 notes that the majority’s rejection of the *exceptio doli* “is predicated upon an extreme individualism which seeks to deny that the law may legitimately superimpose an overriding duty to act in good faith upon the voluntary arrangements of consenting adults.”

<sup>119</sup> Tager 1988 ASSAL 123.

<sup>120</sup> *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* 1988 3 SA 580 (A) at 616. See also Friedman JP’s remarks in *First National Bank of Southern Africa Ltd v Bophuthatswana Consumer Affairs Council* 1995 2 SA 853 (BG) at 865 confirming the void caused by the removal of the *exceptio doli generalis* and calling for legislative intervention.

<sup>121</sup> 2000 4 SA 837 (BH) at 854.

and equity often drift apart. Whatever the value judgments are on standard form contracts, positive or negative, appreciative or derisive, often reflected in the choice of terminology, the Court cannot strike them down unless contracts are illegal or contrary to public policy.

South African contract law's inability, or unwillingness, to address concerns regarding standard-form contracts head-on, or put differently, to treat standard-form contracts as a phenomenon requiring special attention, raises serious doubts about that system's ability to effectively regulate power disparity in state contracting cases.<sup>122</sup> As Hopkins argues:

When the sanctity of contract rule is used to uphold harsh and oppressive standard-form contracts, as happens on a fairly regular basis in our courts, then the private law is in effect facilitating an abuse of power by the party in a stronger bargaining position.<sup>123</sup>

South African courts place strong reliance on the sanctity of contract, *pacta sunt servanda* and enforcing bargains as they stand as a prominent public policy imperative.<sup>124</sup> This fact certainly underscores the doubts raised above.

---

<sup>122</sup> Barnard *A Critical Legal Argument for Contractual Justice in the South African Law of Contract* 209 argues in the context of unfair contract terms: "What is clear is that the existing common law powers of the court are inadequate to bring about transformation. Even where it is accepted that the open-ended values of the common law of contract (eg good faith, public policy, *boni mores*, reasonableness and fairness) exist in theory as common law powers, everything that foregoes this conclusion indicate that the courts will either decline to employ them or employ them in an essentially classical liberalist way which falls far short from what is envisaged by a post-constitutional law of contract."

<sup>123</sup> Hopkins 2003 *TSAR* 150 at 153.

<sup>124</sup> See eg *Law Union and Rock Insurance Co Ltd v Carmichael's Executor* 1917 AD 593 at 598; *Wells v South African Alumenite Company* 1927 AD 69 at 73; *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 4 SA 760 (A) at 767; *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) at 9; *Brisley v Drotsky* 2002 4 SA 1 (SCA) at par 24, 94; *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) at par 22 – 23 and also Lubbe (2004) 121 *SALJ* 395 at 400, who talks of the "standard premise that public policy in general favours the strict enforcement of agreements seriously agreed to by the parties" and at 401 of "the traditional bias in favour of the strict enforcement of agreements"; Naudé & Lubbe (2005) 122

#### **2.2.4 Factors in developing private law to curb abuses of state power**

I argued above that in their current state South African contract law rules do not offer particularly effective regulation of disparity concerns in state commercial activity. The absence of any distinct set of rules aimed at the control of potentially unfair terms in standard-form contracts, a private commercial phenomenon which closely mimics the concerns regarding power disparity in state contracting, especially suggests a systemic failure or inability on the side of contract law to achieve this first regulatory goal. However, I also noted a number of existing principles that may be developed to effectively regulate power disparity in state commercial activity and the potential paths of such development. In this section I consider factors that may impact on the prospects of such development.

There are at least two concerns that may work against the desired development. The first is the notion that the state is equivalent or even analogous to other (significant) commercial entities. This notion presents a serious obstacle to the development of specific rules aimed at controlling the inherent superior power of the state in commercial transactions. The second concern is the open-ended nature of the underlying principles driving the development suggested above. The broad and undefined nature of these principles makes it extremely difficult to clearly identify and weigh them in a complex and pluralistic society such as South Africa. As a result courts are generally reluctant to set in motion extensive development based on such open-ended principles. In contrast to these two concerns that may hamper the development of private law rules to effectively control abuses of power by the state, an appreciation of the fundamental difference between public policy analyses involving the state and similar analyses involving only private parties may present a strong argument in favour of such development.

---

SALJ 441 at 443 – 444, 447; Barnard *A Critical Legal Argument for Contractual Justice in the South African Law of Contract* 83 *et seq*, 159, 184 *et seq* (referring at 186 to “the idol that is freedom of contract”); Cockrell (1992) 109 SALJ 40 at 45 – 46; Hawthorne (2004) 67 *THRHR* 294 at 294 – 295, 299: “[P]acta sunt servanda comprises the highest good”, (1995) 58 *THRHR* 157 at 164; Tladi (2002) 35 *De Jure* 306 at 308 – 317.

#### 2.2.4.1 The state as equivalent to private market participants

There is a strong tendency in South African courts' analysis of state commercial activity to conceive of the state in a commercial capacity as nothing more than just another (significant) market participant.<sup>125</sup> In other words, the courts tend to equate the state with private legal subjects participating in the market and as a result see no need to treat the state differently. In recent years this view has been repeatedly endorsed by the Supreme Court of Appeal,<sup>126</sup> and most recently also by the Constitutional Court.<sup>127</sup> This approach is highly problematic and represents a serious

---

<sup>125</sup> This view is logically linked to the courts' conception of the state's capacity or power to enter into commercial arrangements in the first instance. An analysis that starts with the view that the state has all the powers or capacity of a private legal person and simply exercises such powers when entering into contracts obviously leads one to conclude that the state's actions in terms of the contractual arrangements are also to be equated with other legal subjects' contractual actions. See chapter two at par 3.1.2.2 regarding such a conception of the state's commercial capacity. However, the treatment of the state as an equal contracting party like any other is not necessarily linked to the initial view of the state's capacity to enter into the contractual arrangement. From judgements such as *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC 2001 3 SA 1013 (SCA) and *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) it is clear that a court may unreservedly accept the public nature of the state's power to enter into a specific commercial arrangement and hence differentiate between the state and private commercial parties with regard to the conclusion of the transaction, but still view the state as an equal contracting party like any other when assessing its conduct in terms of the contractual relationship.

<sup>126</sup> See *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) at par 12; *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC 2001 3 SA 1013 (SCA) at par 18; *Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affairs* 1991 4 SA 718 (A) at 724. Even in the more enlightened judgement of Cameron JA in *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) the court inherently endorsed the idea that the state can in specific instances be viewed as an equal bargaining party to other private market participants and hence be treated in the same way, see par 10 – 11.

<sup>127</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 50: "Once the tender is awarded the state and the tenderer are no more than equal contracting parties in an imminent sale." This statement seems curious, to say the least, in a judgement where Moseneke DCJ was in all other respects clearly alive to the particular public law requirements resting on the state party in tender settings, which necessarily sets it apart from

obstacle to the development of common law rules that are more responsive to the concerns surrounding state commercial activity and in particular the concern regarding power disparity. There are a number of good policy reasons why the state should not be equated with private commercial participants. Apart from the constitutional imperatives that place a higher standard of conduct on the state, also in its commercial activities, which I highlighted above and to which I return immediately below, there are strong commercial policy reasons why the state fundamentally differs from other commercial parties. Turpin accurately captures one such reason where he argues:

It is important to remember the basic difference between procurement by government and procurement by the private sector. A private sector firm is generally selling its own products or services in competition with others. Its purchasing officers are impelled to seek value for money and in effect transmit to its suppliers the market pressures operating on the firm they work for. Government, by contrast, is almost always purchasing as a final buyer ... In government, good procurement is essentially a product of skill and sound management in the purchasing organisation, not a response to market forces.<sup>128</sup>

A further related consideration is that the state is never subject to the same liquidity and solvency concerns that all other market participants are. In this sense the state is the party with the ultimate deep pockets. This obviously has a significant differentiating impact on the state's response to legal rules. Not only is the financial threat of legal sanction almost completely absent,<sup>129</sup>

---

private contracting parties. For a similar equation by the Constitutional Court of the state with private legal subjects in the property context, see *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 3 SA 1151 (CC) at par 40.

<sup>128</sup> Turpin *Government Procurement and Contracts* 71. See also Aronson in Taggart (ed) *The Province of Administrative Law* 60, who notes: "Government is not simply another purchaser. It is an agency of a wider public, spending other people's money."

<sup>129</sup> One can argue that in the commercial context the absence of a financial dimension to any potential legal threat means the absence of any legal sanction since such sanctions in the commercial context are by and large of a financial nature. This is even more so with regard to



but its ability and willingness to litigate also fundamentally differ from that of other market participants for whom such choices hold serious financial implications. Joseph Stiglitz identifies a number of economic factors that effectively distinguish the public sector from the private sector.<sup>130</sup> He argues that the state's coercive powers allow it to "solve 'free rider' problems"<sup>131</sup> and that it could "address problems of externalities through corrective taxation."<sup>132</sup> However, he also notes that these coercive powers of the state place additional limitations on the state when spending "coercively raised" public funds.<sup>133</sup> Stiglitz further argues that government workers may be more risk averse than their private counterparts and respond more strongly to negative

---

the state since the State Liability Act 20 of 1957, s 3 only allows monetary judgements to be executed against the state and not an order in any other form. See in this regard Collin's arguments regarding the importance of effective enforcement mechanisms and the vital role that the fear or threat of such enforcement plays in creating an effective regulatory system: Collins *Regulating Contracts* 62, 101 – 102.

<sup>130</sup> Stiglitz in Hardiman & Mulreany (eds) *Efficiency & Effectiveness in the Public Domain* 37.

<sup>131</sup> The free-rider problem refers to situations where multiple parties are involved in a transaction and each party has the incentive to contribute less than his or her fair share of the obligations eg the price, but enjoys a benefit equal to that of all other parties. Minda *Postmodern Legal Movements* 97 succinctly describes it as: "[T]he tendency of one person to freely take the benefit created by the efforts of others." See Posner *Economic Analysis of Law* 61, 122.

<sup>132</sup> Stiglitz in Hardiman & Mulreany (eds) *Efficiency & Effectiveness in the Public Domain* 41. An "externality" is a cost "external to [the] decisionmaking process": Posner *Economic Analysis of Law* 71, or in more detail: "An externality occurs when the consumption or production activity of one individual or firm has an *unintended* impact on the utility or production of another individual or firm. Individual A plants a tree to provide herself shade, but inadvertently blocks her neighbor's view of the valley ... These activities may be contrasted with normal market transactions in which A's action, say, buying the tree, has an impact on B, the seller of the tree, but the impact is fully accounted for through the operation of the price system": Mueller *Public Choice III* 25. An externality is not, however, necessarily a cost as Minda *Postmodern Legal Movements* 285 states: "An externality is a cost or benefit visited by one party upon another without compensation."

<sup>133</sup> Stiglitz in Hardiman & Mulreany (eds) *Efficiency & Effectiveness in the Public Domain* 41: "[I]n democratic societies where leadership is determined by a political process and where public funds, coercively raised, are used, there is an obligation that they be used in a 'fair and

signals.<sup>134</sup> Finally, Stiglitz argues that the “crucial difference” between the public and private sectors can be located in the absence of the threat of bankruptcy in the public sector and the fundamentally different impact of competition, “both as an incentive device and as a monitoring mechanism”, on the two sectors.<sup>135</sup> The near absence of market forces on the state must cause one to pause when applying the legal tools of the market, in particular contract law rules, to the state and to seriously reconsider whether it is justified to apply such rules as if the state is just another contracting party.<sup>136</sup>

---

equitable manner’,” 50: “[T]he greater powers of government – its power to tax – lead to a strong obligation, in democratic societies, that the funds so raised be spent equitably.”

<sup>134</sup> Stiglitz in Hardiman & Mulreany (eds) *Efficiency & Effectiveness in the Public Domain* 43 – 44. He contrasts negative signals, “the failure to deliver some promised service”, with positive signals such as positive performance eg “a reduction in the cost of providing a service” and argues that since positive signals are “hard to detect” while negative ones are “more easily observed”, especially in the public sector, linked to higher levels of risk aversion on the part of state employees, “we would expect government workers to take strong actions to reduce the occurrence of these negative signals and/or to reduce the blame which is assigned to them for these occurrences ... [which] may partly account for the ‘red tape’ often associated with public bureaucracies, the seeming excess reliance on ‘bureaucratic’ procedures.” See also Posner *Economic Analysis of Law* 380: “[S]tate-owned business enterprises are likely to be much less efficient than private profit-making firms because the former are controlled by bureaucrats who lack the normal profit-maximizing incentives and constraints...”

<sup>135</sup> Stiglitz in Hardiman & Mulreany (eds) *Efficiency & Effectiveness in the Public Domain* 45, 47 – 48, where he notes that while “[f]irms face hard budget constraints ... [so that] [i]ncompetent firms thus get eliminated, [t]here is no automatic selection mechanism working within the public sector.” Furthermore, since “financial and social objectives” of public enterprises often “get mixed up” it is extremely difficult to measure the financial success of public enterprises and, as a result, “hard budget constraints [are replaced] with soft budget constraints: the [state owned] firm appeals to the government to cover any losses.” He also argues that “the power to tax almost necessarily implies weak budget constraints; [while] the fact that in the private sector, all transactions must be voluntarily necessarily implies hard budget constraint.” See also Posner *Economic Analysis of Law* 477.

<sup>136</sup> On the impact of the difference between market related considerations applicable to private legal subjects and the state on public policy analyses, see par 2.2.4.3 below.

#### 2.2.4.2 Public policy as open-ended concept

The second problem that may inhibit the development of private law rules towards improved regulation of power disparity in state contracting cases lies in the open-ended nature of the principles that show most promise in driving such development. As noted in paragraphs 2.2.1 and 2.2.2 above these are the *boni mores* and/or public policy. Lubbe<sup>137</sup> notes the difficulty of using open-ended concepts such as public policy to inform the rules of legality in a case such as *Sasfin (Pty) Ltd v Beukes*.<sup>138</sup> He points to the uncertainty regarding exactly what factors are to inform public policy and the often uncritical use of broad and undefined considerations in this regard.<sup>139</sup> To the extent that public policy is to be determined with reference to true principles, in the sense of “fundamentele etiese waardes”,<sup>140</sup> the difficulty lies in identifying and weighing such principles in a complex and pluralistic society.<sup>141</sup> These difficulties may very well account for South African courts’ general conservatism in engaging in any significant scrutiny of the fairness of contracts on either a procedural or substantive level.<sup>142</sup> Fortunately these difficulties are now significantly alleviated by the Constitution. As a number of judgements have recognised, public policy must now be determined with

---

<sup>137</sup> (1990) 1 *Stell LR* 7 at 13 – 14. See also Naudé & Lubbe (2005) 122 *SALJ* 441 at 455.

<sup>138</sup> 1989 1 SA 1 (A).

<sup>139</sup> Lubbe (1990) 1 *Stell LR* 7 at 14 – 15.

<sup>140</sup> Fundamental ethical values (my translation).

<sup>141</sup> Lubbe (1990) 1 *Stell LR* 7 at 15.

<sup>142</sup> The potentially far-reaching approach taken in *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) has not been enthusiastically pursued in subsequent judgements. In fact, the response to that judgement in later judicial pronouncements has been markedly negative and the most often quoted extract from it in the law reports is the warning of Smalberger JA that the power to declare contracts contrary to public policy should be sparingly used. In *Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd and Others* 1993 4 SA 206 (W) at 210 Marais J referred to the *Sasfin* approach critically as a “favourite defence of last resort” and in *Donnelly v Barclays National Bank Ltd* 1990 1 SA 375 (W) Kriegler J at 381 said: “It seems that that judgment has come to be regarded as a free pardon for recalcitrant and otherwise defenceless debtors.” Also note the remarks of Olivier JA in his minority judgement in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 4 SA 302 (SCA) at 326 and Naudé & Lubbe (2005) 122 *SALJ* 441 at 442, 444, 455.

reference to the Constitution.<sup>143</sup> This opens the door to the further development of substantive rules, such as illegality in contract law, on public policy grounds. It does not mean that the gates are now wide open for anything to be justified by vague references to the Constitution as a strategy to overcome previous judicial reluctance in developing fairness remedies in contract law. As the court warned in *Brisley v Drotsky*:<sup>144</sup>

'n Hof kan nie skuiling soek in die skaduwee van die Grondwet om vandaar beginsels aan te val en omver te werp nie; wel in die lig van die Grondwet kan en moet die reg aangepas word. In hierdie konteks is vaagweg na konstitusionele waardes verwys sonder om spesifiek te wees.

The challenge in overcoming the previous reluctance to develop rules based on public policy because of the open-ended nature of that concept is thus now to identify clear principles flowing from the Constitution that inform public policy and that support the development of rules of positive law.

With regard to state commercial activity such principles are to be found in our society's basic constitutional commitments to the type of civic institutions we regard as legitimate. Foremost among these principles are openness, fairness, transparency, a commitment to social justice, equality, accountability and responsiveness.<sup>145</sup> The unambiguous endorsement of these principles in the Constitution provides clear and specific guidance for courts when interpreting public policy in the context of state commercial activity. These principles must be taken seriously in contract law as well and therein lies the potential for the development of contract law doctrine towards more effective regulation of power abuses in state commercial activity.

---

<sup>143</sup> *Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd* 2004 6 SA 66 (SCA) at par 24; *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) at par 18; *Brisley v Drotsky* 2002 4 SA 1 (SCA) at par 91 – 92.

<sup>144</sup> 2002 4 SA 1 (SCA) at par 24 (A court cannot seek refuge in the shadow of the Constitution to criticize and invalidate principles; but in the light of the Constitution the law can and must be adjusted. In this context vague references were made to constitutional values without being specific (my translation)).

<sup>145</sup> See the Preamble and s 1 of the Constitution as well as s 195 and s 217.

In contrast to the concerns raised above that may work against the development of contract law rules, there are also arguments supporting the proposed development. The strongest of these lies in an appreciation of the fundamental difference between public policy analyses involving the state and similar analyses involving only private parties.

#### **2.2.4.3 Differentiated public policy analyses**

German law provides some important insights that support the development of contract law rules as put forward above and which deserve mention here. In German law it is recognised that the administration can only rely on or make use of private law in the sense of a technical system of rules and not in a normative sense.<sup>146</sup> Even in its commercial activity the state remains subject to the normative ordering of public law. This insight has the result that certain (basic) normative principles informing private law simply do not apply to the state despite its use of private law forms.<sup>147</sup> One such principle is private autonomy<sup>148</sup> and the strong sense of individualism underlying much of (South African) private law and in particular the law of contract.<sup>149</sup> This insight necessarily holds important implications for an assessment of public policy considerations in terms of contract law rules such as improperly obtained consent and illegality, when one is dealing with the state. Furthermore, recent South African judgements have brought the strong existing public policy justification for the maximum enforcement of contracts and contractual

---

<sup>146</sup> Ehlers in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 155; Ziekow *Verwaltungsverfahrensgesetz* 461 – 462; Ziekow & Siegel (2004) 95 *VerwArch* 281 at 296 (noting that this insight even limits the applicability of (technical) private law rules to state contracting).

<sup>147</sup> Ehlers in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 155; Ziekow *Verwaltungsverfahrensgesetz* 461 – 462; Ziekow & Siegel (2004) 95 *VerwArch* 281 at 295 – 297.

<sup>148</sup> Ziekow *Verwaltungsverfahrensgesetz* 461 – 462; Ziekow & Siegel (2004) 95 *VerwArch* 281 at 295 – 296; Gurlit *Verwaltungsvertrag und Gesetz* 250.

<sup>149</sup> See the remarks by Professor Hein Kötz in SALC *Unreasonable Stipulations in Contracts and the Rectification of Contracts* 21: “Contract involves free choice of the individuals concerned and is therefore based on the idea of private autonomy.”

freedom in line with constitutional norms such as dignity and freedom, once again affirming the importance of private autonomy as a governing principle.<sup>150</sup> In instances of state contracting the notions of private autonomy, dignity and freedom do not carry the same weight as in cases concerning only private parties. At least one of the parties to such agreements, the state, simply cannot rely on these norms. In cases of state contracting these normally dispositive principles must yield more readily to competing principles such as openness, fairness, transparency, a commitment to social justice, equality, accountability and responsiveness, as outlined above.

Apart from the principle of private autonomy there are also more mundane public policy considerations that do not apply to the state with the result that a public policy analysis in state contracting cases should differ considerably from its purely private equivalent. In a free-market, capitalist society public policy analysis (when done in relation to commercial activity) should and naturally does take account of factors such as profit seeking, competition and freedom of trade,<sup>151</sup> all of which are arguably (wholly or at least in significant aspects) absent in relation to the state.<sup>152</sup> Since these

---

<sup>150</sup> See *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA) at par 15; *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) at par 22 – 23; *Brisley v Drotsky* 2002 4 SA 1 (SCA) at par 94 – 95; Naudé & Lubbe (2005) 122 SALJ 441 at 443.

<sup>151</sup> See eg the endorsement of even severe profit-seeking strategies (in the sense of causing “economic ruin” to another) as acceptable in a “competitive economy” in *Medscheme Holdings (Pty) Ltd and Another v Bhamjee* 2005 5 SA 339 (SCA) at par 18. Freedom of trade is one of the core public policy considerations in restraint of trade cases, see note 85 above. On the different impact of competition on the state and the private sector respectively, see par 2.2.4.1 above.

<sup>152</sup> See Ehlers in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 21 for a discussion of the prohibition in German law against any primary profit objective on the part of the state and cf Davies *Accountability* 205. The principle of cost-effectiveness or value for money is a central requirement for all state commercial activity in South Africa, see eg s 217(1) and s 195(1) of the Constitution and generally Bolton *The Law of Government Procurement in South Africa* 43 – 45, chapter 5. However, this principle should not be equated with profit-seeking as an important driving force in private commercial enterprises. Although the principle of cost-effectiveness or value for money includes a cost-reduction or cost-saving dimension, it also includes a large number of further factors beyond price, which do not form part of the traditional private sector view of profit as “the amount of gain made by the business

factors are “the impulses which determine the contours of common-law concepts such as public policy”,<sup>153</sup> it follows that the difference between private and public contracting in relation to these factors must yield different outcomes where public policy is used to inform the application of contract law rules such as rules relating to improperly obtained consent and legality.<sup>154</sup>

---

during the year and involves a comparison of the assets at two terminal dates, the beginning and the end of the year”: Claassen *Dictionary of Legal Words and Phrases* “profits”. Turpin *Government Procurement and Contracts* 66 notes that “[v]alue for money is not necessarily the same as lowest price”, but includes factors such as “promptness of delivery, reliability of service, level of future operating costs.” See also Bolton *The Law of Government Procurement in South Africa* 44, 102 *et seq.*

<sup>153</sup> Lubbe (2004) 121 SALJ 395 at 400.

<sup>154</sup> Over time these divergent outcomes produced by reliance on the open-ended concept of public policy under a general rule may result in the emergence of new specific rules governing a subset of instances previously covered by the general rule. Following such development, the technical, black-letter legal rules applicable to the state and private parties respectively may thus differ. See Lubbe (2004) 121 SALJ 395 at 404 – 405, where he describes a similar potential development of contract law “as a result of the application of the Bill of Rights through the instrumentality of open norms.” He illustrates such a development with reference to the *Fallgruppen* methodology of German law, which can also serve as an illustration of the development suggested here. This potential development can also be understood in terms of connectionist models in complexity theory. In such a model contract law regulation can be understood as a complex system with the determinants of the open-ended norm, the norm and the general rule as components of the system or nodes in a network that constitutes the system. If this simple model is viewed in terms of layers, the determinants of public policy will be the input layer, the general rule the output layer and the norm the hidden layer, see Cilliers *Complexity and Postmodernism* 27. These components interact (along with many others) to produce the state of the system. The strength of the influence of one component on another is determined by the “weight” of the connection between them. The characteristics of the system are determined by the weights between the different components. Paul Cilliers illustrates that the value of these weights can be determined with reference to Donald Hebb’s use-principle. This principle suggests that the connection strength between two components “should increase proportionally to how often it is used”: Cilliers *Complexity and Postmodernism* 17. If, in applying these insights to the present context, the open-ended norm is viewed as *A* and the individual determinants of the open-ended norm as *B*, *C*, *D* etc this principle can be explained as follows: “Each time both *A* and *B* are active simultaneously, the strength of their interconnectedness (let us call it  $W_{ab}$ ) should be increased slightly, but when they are not active,  $W_{ab}$  should decay slowly. In this way, if *A* and *B* are often active together

$W_{ab}$  will grow, but if  $A$  and  $B$  are only associated spuriously and  $A$  and  $C$  more regularly,  $W_{ab}$  will decay and  $W_{ac}$  will grow. In this way, a network will develop internal structure ... [which] can also be called 'learning' ": Cilliers *Complexity and Postmodernism* 17. This means that when contract law doctrine was originally formulated, containing the general rule informed by public policy as a measure under the rule, as well as the determinants of public policy, there were no weights as yet in the system, ie the system was "untrained" and it could not on its own perform any task, ie control contractual practices. As external agents (judges) force the general rule into activity by identifying specific public policy determinants under particular circumstances and linking those determinants to specific rule outcomes, ie presenting the system with inputs and associated outputs, the system "learns", ie the connection between the specific determinant and the norm is strengthened so that the norm produces a particular outcome under those circumstances, which in turn acts as a particular input to the general rule. If this external intervention has occurred a number of times, the system will "adjust its internal weights, without external intervention ... [and] will be able to perform the required task by itself": Cilliers *Complexity and Postmodernism* 18. Cilliers summarizes this capacity of complex systems usefully: "Clusters of information from the external world flow into the system. This information will influence the interaction of some of the components in the system – it will alter the values of the weights in the network. Following Hebb's rule ..., if a certain cluster is present regularly, the system will acquire a stable set of weights that 'represents' that cluster, i.e. a certain pattern of activity will be caused in the system each time that specific cluster is present": Cilliers *Complexity and Postmodernism* 93. Apart from the impact that differentiated determinant considerations of an open-ended norm may have in the long run on the development of divergent legal rules, such considerations, or policy factors, may also have a more immediate, albeit unarticulated, impact on the development of legal rules. Lubbe (2004) 121 SALJ 395 at 401 states that in *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) the court held that "although 'abstract' considerations such as good faith, reasonableness, fairness and justice are not properly regarded as legal rules, they nevertheless reflect the basis of and rationale for the doctrinal substance of the law and hence can influence its formation and adaptation." He further argues that "the Supreme Court of Appeal subscribes to a model of legal development which recognizes that the technical components of legal doctrine reflect underlying values, amongst which rank the fundamental rights embodied in the Bill of Rights. It is also expressly accepted that these underlying informing values or principles might, in particular instances, be in conflict as to the legal outcomes they require, or that there might arise a need for judicial re-evaluation of the relative weight to be accorded to competing principles. In such cases, adjustments might be required at the doctrinal level to the legal technicalities that are instrumental to the realization of the normative and policy concerns of the law" (footnotes omitted). It is thus arguable that where the relevant abstract policy considerations, that underlie particular legal rules, differ



### 2.3 Goal 2: Ensuring fairness in the precontractual phase

A second set of regulatory concerns regarding state commercial activity relates to the precontractual phase of such activity. One of the clearest and most consistent approaches of South African courts in the last decade in this area of law has been the application of public law rules to the precontractual phase of state contracting. South African law irrefutably recognises the adjudication of public tenders as administrative action, which is simply code for applying public law regulation to such activity.<sup>155</sup> This (often reluctant) application of public law rules to what is otherwise conceived of as purely private commercial activity (and by implication only subject to private law ordering)<sup>156</sup> brings me to the question whether the consistent application of public law in this respect suggests that contract law is unable to achieve regulatory goals in the precontractual stage.

---

between two contexts of contracting, such as private and public contracting, these informing considerations may contribute to the development of divergent legal rules.

<sup>155</sup> See *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 21; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) at par 11 – 12; *Metro Projects CC and Another v Klerksdorp Local Municipality and Others* 2004 1 SA 16 (SCA) at par 12; *Logbro Properties CC v Bedderson NO and Others* 2003 2 SA 460 (SCA) at par 7; *Olitzki Property Holdings v State Tender Board and Another* 2001 3 SA 1247 (SCA) at par 33; *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) at 870; *Umfolozu Transport (Edms) Bpk v Minister van Vervoer en Andere* 1997 2 All SA 548 (SCA) at 552 – 3.

<sup>156</sup> See the almost grudging acknowledgement of the application of administrative law in this regard by Harms JA in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) at par 12: “Everything, though, is not administrative law. Seen in isolation, the invitation to tender is no doubt an offer made by a state organ 'not acting from a position of superiority or authority by virtue of its being a public authority', and the submission of a tender in response to the invitation is likewise the acceptance of an offer to enter into an option contract by a private concern who does so on an equal footing with the public authority. The evaluation of the tender is, however, a process governed by administrative law. Once the tender is awarded, the relationship of the parties is that of ordinary contracting parties, although in particular circumstances the requirements of administrative justice may have an impact on the contractual relationship” (footnotes omitted).

One only has to look at the large number of reported cases dealing with applications for review of tender processes to realise that there is much scope for impropriety at this stage of state contracting. A major goal of regulation here is to guard against abuse of superior power by the state so that much of the discussion in par 2.2 above also applies here. But there are other, more specific, concerns or regulatory goals as well. An important consideration is the one of fair access. Given the enormous scope of state commercial activity there can be no doubt that participation in such activity, or put differently, access to such activity, holds significant commercial or financial implications.<sup>157</sup> As Harlow & Rawlings argue, legal protection of the public interest is strong here in the light of the “ideal of fair access to the benefits of the government market.”<sup>158</sup> Because of its range and extent, state commercial activity thus has significant economic or wealth distribution effects. In South Africa this is a critically important insight since it highlights the vital policy dimension behind access to or participation in state commercial activity.<sup>159</sup> In the redistribution of wealth necessitated by the economic distortions following *apartheid*, state commercial activity is one of

---

<sup>157</sup> I do not think that anyone will seriously doubt the enormous scope and hence value of state commercial activity. The *Green Paper on Public Sector Procurement Reform in South Africa* (GG 17928, 14 April 1997) set the value of public procurement for the 1995/1996 financial year at R56 billion, 13% of gross domestic product. In 1997 Harlow & Rawlings *Law and Administration* 236 noted that public procurement in the UK amounted to an estimated £40 billion annual expenditure. Beyond procurement, one can note that before the invalidation of local government swap transactions in the UK in the 1990's, the single London local authority of Hammersmith and Fulham engaged in swap transactions amounting to 0.5% of the *global* swaps market: Harlow & Rawlings *Law and Administration* 218. See also Khoza & Adam *The Power of Governance* 22 on the “commercial scope” of state business.

<sup>158</sup> Harlow & Rawlings *Law and Administration* 240. See also Arrowsmith (1994) 53 *Cambridge LJ* 104 at 111; Seddon *Government Contracts* 16.

<sup>159</sup> See the government's *Policy Strategy to Guide Uniformity in Procurement Reform Processes in Government* 11 ([www.gov.za](http://www.gov.za), 14 November 2006); *Green Paper on Public Sector Procurement Reform in South Africa* (GG 17928, 14 April 1997) par 1.1, 3; Khoza & Adam *The Power of Governance* 22; Bolton (2004) 121 *SALJ* 619. See also the similar arguments presented in the Australian context by Seddon *Government Contracts* 16.

the most important tools.<sup>160</sup> It follows that fair access is a major regulatory goal.

The problem with contract law regulation of the above concerns seems rather obvious. Traditional contract law analysis explains the process of contracting in terms of offer and acceptance. Only once an offer has been accepted does a contract come into existence and prior to that moment contract law generally confers no rights and places no duties on the parties. However, contract law contains a number of avenues that may be explored in achieving regulatory goals in the precontractual stage of state contracting. These include rules pertaining to duress,<sup>161</sup> a two contract approach to tenders, implied terms and good faith requirements in negotiations.

### **2.3.1 Two-contract approach to tenders**

When public tender processes are subjected to the traditional contract law analysis of offer and acceptance there is no binding legal relationship between the state and tenderer prior to the award of the tender.<sup>162</sup> The tenderer can thus for example withdraw the tender at any time and the state is not obliged to consider the tender at all or to follow any particular procedure if it does consider the bid.<sup>163</sup> This construction is clearly unsatisfactory and as Bingham LJ said in the English case of *Blackpool and Fylde Aero Club v Blackpool Borough Council*,<sup>164</sup> following it would certainly create “an

---

<sup>160</sup> See the remarks of Langa CJ and O'Regan J in their dissenting judgement in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 82: “In our country, government procurement is one of the key mechanisms for ensuring that those previously locked out of economic opportunity by the policies of apartheid, are given an opportunity to participate.”

<sup>161</sup> See par 2.2.1 above for a discussion of the rules regarding duress and its potential development to provide more effective regulation in state contracting cases.

<sup>162</sup> See Van der Merwe *et al Contract: General Principles* 83 – 84; Seddon *Government Contracts* 261 – 262, 266 – 267; Arrowsmith (1994) 53 *Cambridge LJ* 104, (1992) 1 *Public Procurement LR* 92 at 95; Bolton *The Law of Government Procurement in South Africa* 14 – 15.

<sup>163</sup> Seddon *Government Contracts* 266.

<sup>164</sup> [1990] 1 WLR 1195 at 1201.

unacceptable discrepancy between the law of contract and the confident expectations of commercial parties.”<sup>165</sup> In order to avoid such a result the court in that case accordingly found an implied contract between the parties governing their relationship in the precontractual stage before the tender was awarded.<sup>166</sup> The court reasoned that the conditions of tender set out by the public body and the submission of a tender in reliance upon those conditions by the tenderer revealed the usual elements of offer and acceptance resulting in a contract of limited ambit, which placed a legal duty on the public body to treat the applicant’s tender on equal footing with all other tenders received.<sup>167</sup> This amounts to a two-contract approach to tenders. It is important to note that the court implied a contract with very limited content. Bingham LJ described it simply as “a contractual duty to consider”<sup>168</sup> and Stocker LJ as “a legal obligation to consider a tender submitted before any award of a concession was made to any other operator.”<sup>169</sup> The implied contract in no way bound the public body to a specific decision or even to a specific procedure. Bingham LJ was quite careful not to place a duty on the public body to indeed consider the tender.<sup>170</sup> The implied contract thus only infused fairness into the precontractual stage. However, in terms of this approach, the exact content of the implied contract will depend on the express conditions of tender. In this regard the implied contract may bind the state to accept the lowest tender or a tender that exactly and/or best matches the criteria set in the tender conditions for the award, where the criteria were expressed in such

---

<sup>165</sup> See also Van der Merwe *et al Contract: General Principles* 84; Arrowsmith (1994) 53 *Cambridge LJ* 104 at 106, 115; Seddon *Government Contracts* 266.

<sup>166</sup> *Blackpool and Fylde Aero Club v Blackpool Borough Council* [1990] 1 WLR 1195 at 1202.

<sup>167</sup> *Blackpool and Fylde Aero Club v Blackpool Borough Council* [1990] 1 WLR 1195 at 1202 (per Bingham LJ), 1203 – 1204 (per Stocker LJ).

<sup>168</sup> *Blackpool and Fylde Aero Club v Blackpool Borough Council* [1990] 1 WLR 1195 at 1202.

<sup>169</sup> *Blackpool and Fylde Aero Club v Blackpool Borough Council* [1990] 1 WLR 1195 at 1203.

<sup>170</sup> *Blackpool and Fylde Aero Club v Blackpool Borough Council* [1990] 1 WLR 1195 at 1202: “[T]he invitee is in my judgment protected at least to this extent: if he submits a conforming tender before the deadline he is entitled, not as a matter of mere expectation but of contractual right, to be sure that his tender will after the deadline be opened and considered in conjunction with all other conforming tenders or at least that his tender will be considered if others are.”

absolute and binding way.<sup>171</sup> It may bind the state to in fact award a tender or to exclude non-complying tenders from evaluation. It is clear that this analysis can go quite far in binding the state, depending on the facts of the matter at hand.<sup>172</sup>

In South African law, Harms JA in *Steenkamp NO v Provincial Tender Board, Eastern Cape*<sup>173</sup> expressed agreement with the approach in *Blackpool and Fylde Aero Club v Blackpool Borough Council*.<sup>174</sup> Although there are some contradictory remarks in his *ratio decidendi* regarding the application of a two-contract approach, Harms JA endorsed such an approach in an *obiter dictum*.<sup>175</sup> Similar remarks have been made in other South African judgements in favour of a two-contract approach to tendering, but there has

---

<sup>171</sup> See Seddon *Government Contracts* 269; Bolton *The Law of Government Procurement in South Africa* 14.

<sup>172</sup> Arrowsmith (1992) 1 *Public Procurement LR* 92 at 96. For a comprehensive discussion of the two-contract approach in various common law jurisdictions, see Seddon *Government Contracts* 261 – 309.

<sup>173</sup> 2006 3 SA 151 (SCA) at par 12, 51.

<sup>174</sup> [1990] 1 WLR 1195.

<sup>175</sup> See *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) at par 12 where Harms JA seems to be in favour of such an analysis stating with express reference to the *Blackpool* decision: “Seen in isolation, the invitation to tender is no doubt an offer made by a state organ ‘not acting from a position of superiority or authority by virtue of its being a public authority’, and the submission of a tender in response to the invitation is likewise the acceptance of an offer to enter into an option contract by a private concern who does so on an equal footing with the public authority” (footnotes omitted). However, at par 33, he seems far less inclined to apply such analysis, when he stated: “The unsuccessful tenderers’ status to compel, by injunction or mandamus, a public authority to properly award a public works contract is not founded upon the private tenderers’ rights, but on the public’s interest in the integrity of the bidding process.” In an *obiter dictum* at par 51, the judge stated, again with specific reference to the *Blackpool* case: “Only entities with contractual capacity can perform juristic acts such as making an offer (such as the tender submission) ... Submitting a tender involves more than merely making an offer. It amounts to the conclusion of a preliminary agreement, which is also a juristic act, in which the tenderer accepts the tender conditions imposed and undertakes to comply with them ... by submitting a tender an option contract is concluded and that the option is exercised by the award of the tender.”

been no binding decision on point.<sup>176</sup> Recognition of the precontractual actions of public bodies as administrative action largely overshadows local legal analyses on this topic.<sup>177</sup>

Despite a number of advantages of the two-contract approach in regulating the precontractual stage of state tendering<sup>178</sup> this approach does not generate effective regulation of the concerns raised above, at least not in the South African context. The advantages are the particular commercial nature of the regulation in the sense that it ostensibly gives effect to the expectations of the parties to the transaction without imposing external norms on the transaction and the availability of damages claims.<sup>179</sup> The

---

<sup>176</sup> In *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) Moseneke DCJ at par 21 also seems to acknowledge the viability of a two-contract approach to tendering, but seems to suggest that such analysis is unnecessary in the light of the public law analysis adopted in South Africa, ie the classification of such state action as administrative action: “[A]lthough an invitation to tender and its acceptance may be susceptible to common law rules of contract, when a tender board evaluates and awards a tender, it acts within the domain of administrative law.” In *Logbro Properties CC v Bedderson NO and Others* 2003 2 SA 460 (SCA) at par 7 Cameron JA assumed without deciding that the conditions of tender did constitute a contract between the public body and tenderers. It is clear, however, that such an analysis was adopted by McLaren J in the High Court decision that preceded and lead to the matter before the court, see par 6 of Cameron JA’s judgement. Traditionally, South African law has viewed an invitation to tender as only an invitation to make an offer, with the tender itself functioning as the sole offer: *G & L Builders CC v McCarthy Contractors (Pty) Ltd and Another* 1988 2 SA 243 (SE) at 247; *Wentzel v Gemeenskapsontwikkelingsraad en Andere* 1981 3 SA 703 (T) at 707; *Leyds NO v Simon and Others* 1964 1 SA 377 (T) at 383; Nienaber in Joubert (ed) *The Law of South Africa* vol 2(1) (2<sup>nd</sup> edition) par 460; Kerr *The Principles of the Law of Contract* 68 – 69; Bolton *The Law of Government Procurement in South Africa* 14.

<sup>177</sup> See the remarks of Moseneke DCJ in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 21 quoted in note 176 above.

<sup>178</sup> See Seddon *Government Contracts* 267 *et seq*; Harlow & Rawlings *Law and Administration* 243; Beatson in Beatson & Friedman (eds) *Good Faith and Fault in Contract Law* 287; Arrowsmith (1994) 53 *Cambridge LJ* 104 at 115; Davenport (1991) 107 *LQR* 201.

<sup>179</sup> Seddon *Government Contracts* 268, 270 – 271, 290 – 295; Beatson in Beatson & Friedman (eds) *Good Faith and Fault in Contract Law* 287; Arrowsmith (1994) 53 *Cambridge LJ* 104 at 115; Davenport (1991) 107 *LQR* 201 at 202. Phang (1991) 4 *Journal of Contract Law* 46, however, argues that implying a binding contract between the parties in the

disadvantages are the lack of flexibility, the often strained and artificial appearance of the implied terms or entire contract<sup>180</sup> and the ease with which it can be evaded.<sup>181</sup> Regarding the charge of inflexibility the concern is that placing binding obligations on the parties during the precontractual stage may unduly restrict freedom to respond to circumstances and to guide the procedure in a way that is sensitive to the particular situation. Both from a commercial and a fairness point of view this is a valid concern. Commercially it makes sense to allow some flexibility to the state in order to respond meaningfully to the actual tenders received so that best value for (public) money can be realised.<sup>182</sup> Flexibility has also long been recognised as an

---

precontractual stage in fact goes against the expectations of the parties, since market participants are familiar with the normal contract law analysis that suggests that the call for tenders is simply an invitation to do business, with the tenders themselves only offers and the award the acceptance. He argues accordingly that these parties would only expect a binding contract to come into existence once the tender has been awarded and not prior to that moment. Although Phang is obviously correct in his application of the usual contract law analysis to tender processes, I must agree with the commentators quoted above that a tenderer certainly harbours the expectation that its tender will at least be considered along with all the other tenders. It is difficult to see why anyone, especially in commerce, will invest the time and cost in preparing and submitting a tender if it is not accompanied by the stated expectation. In this regard I think Bingham LJ must surely be correct when he stated in *Blackpool and Fylde Aero Club v Blackpool Borough Council* [1990] 1 WLR 1195 at 1202: “Had the club [the tenderer], before tendering, inquired of the council whether it could rely on any timely and conforming tender being considered along with others, I feel quite sure that the answer would have been ‘of course.’”

<sup>180</sup> The concern here is that a bargain is often implied where there is no clear indication of an intention to create legal obligations: Beatson in Beatson & Friedman (eds) *Good Faith and Fault in Contract Law* 287; Arrowsmith (1994) 53 *Cambridge LJ* 104 at 116. Although he does not seem to share this view, Davenport (1991) 107 *LQR* 201 at 202 captures this artificiality effectively when he states: “[T]he term needed a contract into which it could be implied.”

<sup>181</sup> Seddon *Government Contracts* 268, 271, 285 – 287; Harlow & Rawlings *Law and Administration* 243; Beatson in Beatson & Friedman (eds) *Good Faith and Fault in Contract Law* 287; Arrowsmith (1994) 53 *Cambridge LJ* 104 at 116; Davenport (1991) 107 *LQR* 201 at 202.

<sup>182</sup> This is effectively illustrated by the facts in *Logbro Properties CC v Bedderson NO and Others* 2003 2 SA 460 (SCA). In that case a decision to award a tender was set aside upon

essential aspect of achieving fairness.<sup>183</sup> However, it is the third disadvantage that creates the most doubt as to whether the two-contract approach can in fact produce effective regulation of the precontractual stage. Given that the pre-award (first) contract is derived from the conditions of tender it is extremely easy for the state to avoid any liability during the precontractual stage by careful drafting. The state can either evade any regulation in this fashion by stating in the conditions of tender that it has no intention of creating binding obligations prior to the award of the contract or it can in fact use this form of regulation to strengthen its own position. By drafting the conditions of tender in such a way that it places no obligations on the state, but only on the tenderers, the state can turn the pre-award contract into a particularly one-sided agreement. In this way the two-contract approach amounts to more control by the state and less effective regulation. Its potentially ambiguous effect and the ease with which this form of regulation can be evaded fundamentally undermine its potential.

The final problem with the two-contract approach is one of remedies. What would a tenderer's remedy be in the case of a precontractual procedural failure on the part of the state? Specific performance will only be relevant or

---

review and referred back to the relevant organ of state for reconsideration. However, the organ of state decided not to award a tender upon reconsideration, but to call for fresh tenders, because of a sharp increase in the value of the property offered for sale. Although the court eventually found that the decision was tainted on procedural grounds, it agreed that the decision was one the organ of state could legitimately take. A strict two-contract analysis in this case may have prevented the organ of state from calling for fresh tenders at all and hence achieving the best possible price for the public asset. However, it is of interest to note that a two-contract analysis on the facts would most probably not have prevented the organ of state from taking the route it did, ie calling for fresh tenders. From the High Court's analysis in the first round of litigation it seems that the conditions of tender, which, on a two-contract approach, would constitute the terms of the pre-award (first) contract, were drafted wide enough to allow the organ of state to withdraw the property from the current tender process and call for fresh tenders. See par 6 of Cameron JA's judgement. This illustrates that the perceived inflexibility of the two-contract approach may be more apparent than real and can effectively be limited by careful drafting of the conditions of tender.

<sup>183</sup> This is eg well illustrated by the flexible application of the rules of natural justice as a major component of procedural fairness in administrative law, see Hoexter *Administrative Law in South Africa* 326 – 330 and s 3(2)(a) of PAJA.



an effective remedy in a limited number of instances. This will mostly only be the case when the tenderer becomes aware of the actual or impending failure *before* the tender is awarded.<sup>184</sup> These instances are bound to be rare. Far more likely is the scenario where the tender has already been awarded and an unsuccessful tenderer becomes aware of a procedural irregularity in the precontractual stage. The only remedy available in such a case would be damages. Indeed, as noted above, many commentators view this enforceable damages claim as an advantage of the two-contract approach.<sup>185</sup> However, the effectiveness of this remedy is doubtful. In this regard Harms JA's statement in *Steenkamp NO v Provincial Tender Board, Eastern Cape*<sup>186</sup> regarding a delictual damages claim is telling:

[A] disappointed tenderer's claim ... for out-of-pocket expenses in preparing the tender will inevitably fail at the causation hurdle. Those expenses were not caused by any administrative impropriety because they would, in any event, have been incurred and are always irrecoverable, irrespective of whether or not the tender was awarded to that party, properly or improperly.

The only alternative measure of damages would be loss of profits. However, for an unsuccessful tenderer to succeed in such a damages claim it must prove that the tender would have been awarded to it had the state adhered to its pre-award contractual obligations and the amount of profit it would have made.<sup>187</sup> This is by no means an easy burden of proof and given the

---

<sup>184</sup> Eg if the tenderer in *Blackpool and Fylde Aero Club v Blackpool Borough Council* [1990] 1 WLR 1195 became aware of the fact that its tender was mistakenly marked as late prior to the award of the tender, it could have approached a court for an order of specific performance enjoining the council to indeed consider that tenderer's conforming tender along with all the other tenders.

<sup>185</sup> See note 179 and accompanying text above.

<sup>186</sup> 2006 3 SA 151 (SCA) at par 35.

<sup>187</sup> See Arrowsmith (1994) 53 *Cambridge LJ* 104 at 115, 125 – 126, who argues that a different measure of damages should be developed for such instances to provide for “compensation for losses incurred in relying on the disappointed expectation [that the conditions of tender will be followed] ... Effectively it will mean that a bidder will recover his tender costs if, but for his expectation, he would not have tendered ... [but] only where the bidder would have won the contract and in this way recouped his expenditure” (footnotes

tendency to formulate the criteria for the award of tenders in wide and discretionary terms,<sup>188</sup> most likely an impossible one.<sup>189</sup>

### 2.3.2 Standards of conduct in negotiation

Short of placing binding contractual obligations on the parties to the tender process in the precontractual stage private law may still be able to demand certain standards of conduct from parties in negotiation. Although South African law has not clearly embraced any such notions, it is not uncommon in other legal systems.<sup>190</sup> Van der Merwe *et al* note that such standards may require a negotiating party to share information, to safeguard confidentiality

---

omitted). She argues that loss of profits should not be recoverable and acknowledges that it may be difficult under such a measure of damages to ascertain whether the bidder would have bid in the absence of the expectations created by the tender conditions and also whether it would have won the contract. She argues, however, that these difficulties may be overcome by “adopting a presumption that the bidder would have been successful and earned sufficient to recoup his expenditure.” Although I agree that a presumption in respect of the second point, viz sufficient earnings, may be justifiable if it has been established that the aggrieved bidder would have been successful, I cannot see why there should be a presumption in respect of the first question, viz whether the bidder would have won the award. Certainly this amounts to shifting the burden of proof in respect of the central question regarding causation in the aggrieved bidder’s claim to the state defendant, something that I find difficult to justify. For similar arguments in the context of public procurement governed by European Community procurement rules, see Arrowsmith (1992) 1 *Public Procurement* LR 92 at 107 – 109. See also Seddon *Government Contracts* 292 – 295.

<sup>188</sup> Especially that the state is not obliged to make an award at all.

<sup>189</sup> The policy considerations that have convinced South African courts in recent years not to recognise a delictual claim for damages in the public tender context, such as shielding limited state resources and the undesirability of having courts second-guessing tender decisions by organs of state, will also in all likelihood prevent courts from allowing a damages claim in contract in such instances. See *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC); *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA); *Olitzki Property Holdings v State Tender Board and Another* 2001 3 SA 1247 (SCA).

<sup>190</sup> See Van der Merwe *et al Contract: General Principles* 84.

and generally to take reasonable account of the other party's legitimate expectations.<sup>191</sup>

### **2.3.2.1 Restrictions on refusals to contract**

Beatson notes that despite the general rule in contract law that a party can break off negotiations at any point prior to the conclusion of the contract without incurring liability, there have developed in common law certain instances where such conduct will either be limited or at least the reasons for the conduct judicially scrutinised.<sup>192</sup> These are the so-called “common callings” cases where innkeepers and common carriers are prohibited from unreasonably refusing to contract with specific members of the public and cases where a refusal to contract amounts to an unreasonable infringement of a person's freedom to trade.<sup>193</sup> In both these types of cases English courts have been willing to examine the reasons for a refusal to contract and award damages where they found the reasons to be lacking. Beatson argues that the common feature of these cases, distinguishing them from the “normal” contract scenarios where no such liability exists, is the monopoly or near monopoly powers exercised in the given context by the contract refuser.<sup>194</sup>

Although these common law principles have not developed beyond the limited application just mentioned it creates a starting-point for the development of common law remedies restricting the state in its

---

<sup>191</sup> Van der Merwe *et al* *Contract: General Principles* 84. See also Seddon *Government Contracts* 320.

<sup>192</sup> Beatson in Beatson & Friedman (eds) *Good Faith and Fault in Contract Law* 279 – 280. See also Daintith (1979) 32 *Current Legal Problems* 41 at 43.

<sup>193</sup> Beatson in Beatson & Friedman (eds) *Good Faith and Fault in Contract Law* 279 – 280; Daintith (1979) 32 *Current Legal Problems* 41 at 43; Oliver 1997 *Public Law* 630 at 633 – 634.

<sup>194</sup> Beatson in Beatson & Friedman (eds) *Good Faith and Fault in Contract Law* 280; Daintith (1979) 32 *Current Legal Problems* 41 at 43. See also Oliver 1997 *Public Law* 630 at 633 – 634 and Mullan in Taggart (ed) *The Province of Administrative Law* 145 – 146, who points to these rules as an example of the “effectuation of broader public regulatory goals through contract law.”

precontractual activity.<sup>195</sup> The state certainly also wields a monopoly power when it comes to government contracting. It solely decides on who gains access to the state market.<sup>196</sup>

One has to agree with Beatson, however, that modern legislative intervention in this context banning *inter alia* discriminatory and anti-competitive practices, has overtaken common law development and most probably closed the door to the further development of these principles.<sup>197</sup> In theory the horizontal application of the Bill of Rights in South Africa should reduce the incentive for such internal common law development. However, these common law principles are of relevance in the present context for at least two reasons. Firstly, they indicate contract law's notional capacity to respond to specific precontractual concerns and to develop rules that meaningfully regulate conduct in such instances. While future development of private law rules in this context should theoretically be based on constitutional and legislative foundations, these common law principles show that such development will not be incongruent with existing private law doctrine. Secondly, they create scope for the development of specific contract law rules relating to distinctive scenarios such as the precontractual stage of state contracting where no specific legislative or constitutional provisions seem to address legitimate concerns.

### **2.3.2.2 *Culpa in contrahendo***

Another private law route towards enforcing minimum standards of conduct on parties prior to contracting is the doctrine of *culpa in contrahendo* as

---

<sup>195</sup> Taggart in Joseph (ed) *Essays on the Constitution* 214 argues that these common law principles could form the basis of judicial regulation of otherwise uncontrolled conduct by private utilities. See also Aronson in Taggart (ed) *The Province of Administrative Law* 48 – 49.

<sup>196</sup> See the introduction to par 2.3 above on the importance of access to the state market. See also Collins *The Law of Contract* 141 where it is argued that the state's monopoly power over the supply of certain services, eg sewerage, may render contracts entered into under threat of refusal to supply the service liable to determination on the grounds of duress in English law.

<sup>197</sup> Beatson in Beatson & Friedman (eds) *Good Faith and Fault in Contract Law* 280 – 281.

developed in German law.<sup>198</sup> The doctrine recognises a damages remedy for pure economic loss where one party has misled another in contracting despite the voidness of the contract.<sup>199</sup> The claim is however only for negative *interesse*.<sup>200</sup> As such it seems to have characteristics of both contractual and delictual liability.<sup>201</sup> The doctrine of *culpa in contrahendo* has been applied to public contracting in German law even before the codification of public contracts in the *VwVfG* and the consequent supplementary application of the *BGB* to such contracts.<sup>202</sup> The private counterparty can thus claim damages for its loss in reliance on the validity of the contract where the state has

---

<sup>198</sup> Zieff (1989) 52 *THRHR* 348 at 357 *et seq.* See also generally Zimmermann *The Law of Obligations* 244 – 245.

<sup>199</sup> Gurlit *Verwaltungsvertrag und Gesetz* 469 *et seq.*; Zieff (1989) 52 *THRHR* 348 at 360; Zimmermann *The Law of Obligations* 244.

<sup>200</sup> Zimmermann *The Law of Obligations* 244; Gündling *Modernisiertes Privatrecht und öffentliches Recht* 333. But cf Gurlit *Verwaltungsvertrag und Gesetz* 472, who argues that in some contexts, in particular with reference to public tenders, a claim for positive *interesse* may be possible.

<sup>201</sup> Zieff insists that the remedy developed as a contractual one and could be incorporated into South African law as such: (1989) 52 *THRHR* 348 at 358 – 359, 363 – 368, but cf Van der Merwe *et al Contract: General Principles* 85, who refer to Zieff's arguments in relation to potential liability *ex delicto* following improper conduct in negotiations and at 30, stating that the doctrine gives rise to a claim in damages *ex delicto*. Zimmermann *The Law of Obligations* 244 – 245 states that liability is contractual, but also notes: "Culpa in contrahendo falls squarely into the grey area between the law of contract and the law of delict."

<sup>202</sup> *VwVfG* § 62 S 2 applies the *BGB* to public contracts supplementary to the specific and general rules contained in the *VwVfG* and as appropriate. Before the *Schuldrechtsmodernisierung* of 2001 it was controversial whether contract law rules outside of the *BGB*, such as the judge-made doctrine of *culpa in contrahendo* and rules contained in other statutes eg the *AGBG*, could also find application to *Verwaltungsverträge* in the light of the specific reference to the *BGB* in *VwVfG* § 62 S 2. With the incorporation of these rules into the *BGB*, this controversy has now been resolved. *OVG Koblenz*, decision of 8.12.2003, (2004) 17 *NVwZ-RR* 241; Gündling *Modernisiertes Privatrecht und öffentliches Recht* 51, 341; Gurlit in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 732; Ziekow *Verwaltungsverfahrensgesetz* 463; Ziekow & Spiegel (2004) 95 *VerwArch* 573 at 582; Dötsch (2003) 56 *NJW* 1430; Grziwotz (2002) 21 *NVwZ* 391 at 392; Dötsch (2001) 15 *NWVBf* 385 at 386 – 387; Gurlit *Verwaltungsvertrag und Gesetz* 466.

negligently failed in its duty of care towards such private party.<sup>203</sup> Along this private law route fairness considerations by means of a required standard of conduct was introduced into state contracting at the precontractual stage irrespective of whether the resultant contract was subject to private or public law ordering. It seems therefore to achieve effective regulation via private law of precontractual concerns in state contracting.

The doctrine of *culpa in contrahendo* does not form part of South African law.<sup>204</sup> It seems unlikely that such a doctrine will be incorporated within South African contract law generally and in particular with respect to state contracting. South African courts have been extremely reluctant to endorse any increased (direct) reliance on *bona fides* in recent years.<sup>205</sup> This does not bode well for the local recognition of *culpa in contrahendo* to the extent that that doctrine is viewed as an enforcement of the *bona fides* standard to precontractual conduct.<sup>206</sup> The protection of reliance created during the precontractual stage by means of the recognition of “progressive contracting” as parties reach consensus on specific aspects of their bargain while continuing negotiations on other aspects, may be as far as South African courts are willing to go in applying contractual regulation to the precontractual stage.<sup>207</sup>

---

<sup>203</sup> Gurlit *Verwaltungsvertrag und Gesetz* 466; Gündling *Modernisiertes Privatrecht und öffentliches Recht* 333, 342 – 343.

<sup>204</sup> Despite calls for its recognition, see Zieff (1989) 52 *THRHR* 348 at 357 *et seq.* Van der Merwe *et al Contract: General Principles* 85 – 86.

<sup>205</sup> See in particular *Brisley v Drotsky* 2002 4 SA 1 (SCA).

<sup>206</sup> See Zieff (1989) 52 *THRHR* 348 at 361 and 364, where he argues that the principle of *bona fides* is the key to the recognition of *culpa in contrahendo* in South African law.

<sup>207</sup> See Van der Merwe *et al Contract: General Principles* 87 – 88. Thus in *CGEE Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd* 1987 1 SA 81 (A) Corbett JA said at 92: “There is no doubt that, where in the course of negotiating a contract the parties reach an agreement by offer and acceptance, the fact that there are still a number of outstanding matters material to the contract upon which the parties have not yet agreed may well prevent the agreement from having contractual force ... Where the law denies such an agreement contractual force it is because the evidence shows that the parties contemplated that consensus on the outstanding matters would have to be reached before a binding contract could come into existence ... The existence of such outstanding matters

### 2.3.2.3 Delictual liability for precontractual action

Despite the absence of contractual liability and the slim chances of the development of any such remedy, there may still be the possibility of delictual liability attaching to precontractual conduct. There seems to be no reason why such liability should not attach to precontractual action that meets the general requirements for delictual liability.<sup>208</sup> However, in the light of the extreme reluctance of South African law to award delictual damages for pure economic loss,<sup>209</sup> delict is not likely to be an effective regulatory tool in the tender context either. In relation to public tendering in particular a number of recent judgements have made it clear that flawed state conduct will not easily (if at all) be visited with delictual liability.

In *Olitzki Property Holdings v State Tender Board and Another*<sup>210</sup> Cameron JA held that an unsuccessful tenderer for a state contract could not claim damages in the form of lost profits either in delict based on the procurement provisions of the 1993 Constitution<sup>211</sup> or as a constitutional remedy based on the violation of its right to administrative justice.<sup>212</sup> In assessing whether there was a legal duty in this case to establish delictual liability, Cameron JA noted:

---

does not, however, necessarily deprive an agreement of contractual force. The parties may well intend by their agreement to conclude a binding contract, while agreeing, either expressly or by implication, to leave the outstanding matters to future negotiation with a view to a comprehensive contract. In the event of agreement being reached on all outstanding matters the comprehensive contract would incorporate and supersede the original agreement. If, however, the parties should fail to reach agreement on the outstanding matters, then the original contract would stand.” Finding such “original agreement” will thus bar any party from walking away from the bargain at an advanced stage of negotiations.

<sup>208</sup> Van der Merwe *et al Contract: General Principles* 84 – 85.

<sup>209</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) at par 27, 68; Neethling, Potgieter & Visser *Deliktereg* 60, 317.

<sup>210</sup> 2001 3 SA 1247 (SCA).

<sup>211</sup> Section 187.

<sup>212</sup> Section 24 of the 1993 Constitution.

This process involves the court applying a general criterion of reasonableness, based on considerations of morality and policy, and taking into account its assessment of the legal convictions of the community ... and now also taking into account the norms, values and principles contained in the Constitution.<sup>213</sup>

Based on this broad investigation Cameron JA came to the conclusion that a claim for lost profits because of “misfeasance in the actual award” and based on the procurement provisions of the 1993 Constitution, was not “just and reasonable, or in accord with the community's sense of justice, or assertive of the interim Constitution's fundamental values.”<sup>214</sup> In rejecting the claims he also specifically referred to the detrimental impact such claims could have on state resources, noting, “the grave impact on the exchequer raises a critical policy consideration.”<sup>215</sup> Most recently both the Supreme Court of Appeal and the Constitutional Court rejected a delictual claim for out-of-pocket expenses based on a failed tender process.<sup>216</sup> In the Supreme Court of Appeal Harms JA concluded:

Weighing up these policy considerations I am satisfied that the existence of an action by tenderers, successful or unsuccessful, for delictual damages that are purely economic in nature and suffered because of a *bona fide* and negligent failure to comply with the requirements of administrative justice cannot be inferred from the statute in question. Likewise, the same considerations stand in the way of the recognition of a common-law legal duty in these circumstances.<sup>217</sup>

---

<sup>213</sup> *Olitzki Property Holdings v State Tender Board and Another* 2001 3 SA 1247 (SCA) at par 11.

<sup>214</sup> *Olitzki Property Holdings v State Tender Board and Another* 2001 3 SA 1247 (SCA) at par 30.

<sup>215</sup> *Olitzki Property Holdings v State Tender Board and Another* 2001 3 SA 1247 (SCA) at par 41.

<sup>216</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC); *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA). See par 2.4.5 below for a discussion of the facts in this matter.

<sup>217</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) at par 46.



The policy considerations that moved the court to this conclusion were the relevant organ of state's discretion in awarding the tender;<sup>218</sup> the burden it would place on public funds;<sup>219</sup> that such liability "may hamper administrative organs unduly in the execution of their duties"<sup>220</sup> and that such remedy would not be an appropriate way of enhancing accountability in government.<sup>221</sup> The Constitutional Court endorsed Harms JA's conclusion as well as the considerations he relied upon.<sup>222</sup> Moseneke DCJ echoed the wide and general scope of the inquiry, stating:

[W]hether or not a legal duty to prevent loss occurring exists calls for a value judgment embracing all the relevant facts and involving what is reasonable and, in the view of the court, consistent with the common convictions of society ... the ultimate question is whether on a conspectus of all relevant facts and considerations, public policy and public interest favour holding the conduct unlawful and susceptible to a remedy in damages.<sup>223</sup>

---

<sup>218</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) at par 32.

<sup>219</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) at par 33, 40.

<sup>220</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) at par 37.

<sup>221</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) at par 39.

<sup>222</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 47, 55, 56.

<sup>223</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 39 and 42. However, note the strong dissent by Langa CJ and O'Regan J (Mokgoro J concurring) who argued that delictual liability should be allowed in this case and highlighted the policy considerations favouring such liability in contrast to the considerations identified by the majority and Supreme Court of Appeal against such liability (at par 94). The policy considerations favouring delictual liability according to the minority included a need to protect "often new, small and not financially robust" black-owned tenderers trying to gain access to state business (at par 82, 94) and the very real possibility that "the efficient and speedy performance of government contracts might be undermined were successful tenderers to be left without remedy for out-of-pocket expenses" (at par 94). The minority judgement accurately recognised the potential of delictual liability as an instrument to regulate fair access concerns in the precontractual stage of state commercial activity. It is a pity that the majority of the judges did not share this insight.

The sweeping statements made in all these judgements to the effect that broad public policy considerations, anchored in the Constitution, militated against the recognition of delictual liability in the various failed tender scenarios, strongly suggest that delictual liability is not a viable candidate for effective private law regulation of precontractual state conduct.<sup>224</sup>

## **2.4 Goal 3: Managing the consequences of *ultra vires* state action**

Particular concerns exist around capacity in respect of state commercial activity and the question is whether an exclusively private law approach can adequately respond to these concerns. The basic problem is that because of

---

<sup>224</sup> The one exception to these judgements is *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 1 SA 299 (SCA) where Howie P held that loss of profits may indeed be recoverable by means of a delictual claim in the context of a failed public tender process. However, in that case the state party both acknowledged the failure in the tender process and, most importantly, that the claimant would have won the tender but for such failure. The only question before the court was whether loss of profit could in principle be recovered on a delictual cause of action. In two noteworthy paragraphs Howie P stated: “[16] The idea that loss of profit is not recoverable in delict is not historically founded. Indeed, the converse is the case. Moreover, it is commonly the subject of an award of damages for loss of earning capacity in personal injury cases. Why should it matter that the injury is not physical but economic, as long as the loss is one of earning capacity? Take the example of the owner of a taxi that is negligently damaged. He has a claim for the profit lost while the vehicle is out of action. Can it make any difference if, subject to quantification, the delict is committed when he has just bought the vehicle, before commencing business? I think not. Nor can it matter if the loss were caused by fraudulent conduct, not negligence. Clearly, the loss would impair his earning capacity and that is part of his patrimony. The claimant in the present case is a company. Once again, that can make no difference. Its patrimony has been impaired by having the bargain that it was on the point of acquiring dishonestly snatched away. [17] Accordingly, in my view there is nothing in principle or the facts which bars recovery of damages by way of loss of profits in this case. It follows that the appellant's main submission must fail. The respondent is entitled to be placed in the position it would have been in but for its having been fraudulently deprived of the purchase that it was destined to be awarded” (footnotes omitted). However, before a claimant would be able to rely on this ruling, it would have to prove both wrongfulness and causation, which is an almost impossible burden to satisfy in the absence of concessions such as those in this case and in the light of the strong sentiments against such delictual liability discussed above.

the state's limited ability to act,<sup>225</sup> there is always the risk that the transaction may amount to an *ultra vires* act<sup>226</sup> on the part of the state and hence a nullity.<sup>227</sup> In this paragraph I investigate whether private law can curb this risk or redress it once it has materialised.

The concerns raised here are perhaps best illustrated by the English local council interest swaps litigation of the 1990's.

#### **2.4.1 The English local council interest swaps cases as illustration**

During the 1980's many local councils in England turned to the futures markets in order to manage their debts and also to increase their income.<sup>228</sup> Interest swaps became a favourite tool to hedge against fixed rate borrowing and to increase revenue.<sup>229</sup> Basically, in terms of an interest swap agreement a liability calculated with a fixed rate of interest is exchanged for one

---

<sup>225</sup> See chapter two above on the state's formal capacity to enter into commercial transactions. However, as will emerge from the discussion that follows, the limit envisaged here is more general than simply the question of the state's formal capacity. It includes limitations on the formal capacity in the form of requirements that need to be met before the state's actions will be legally enforceable. These are requirements that will be attached to the state's actions irrespective of whether the commercial activity at stake is regulated by private or public law.

<sup>226</sup> I am using the term *ultra vires* in a very broad sense here to describe any act that falls beyond the scope of a body's limited powers or that is invalid whether because the body objectively does not have the power to engage in such activity or whether it failed to adhere to mandatory requirements in the exercise of powers it does have.

<sup>227</sup> Whether this is a risk for the state party or the counterparty will largely depend on which party stands to benefit most from the contract at any given point in time. It is clear that any party may potentially use this risk to escape from the contract when it no longer serves its best interest: Clarke & Otton-Goulder in Black, Muchlinksi & Walker (eds) *Commercial Regulation and Judicial Review* 111. Davies (2006) 122 *LQR* 98 states: "And perhaps the most serious problem with the [ultra vires] doctrine is that once a contract has been found to be ultra vires, it must in general be unravelled."

<sup>228</sup> Harlow & Rawlings *Law and Administration* 217 – 218; Freedland in Craig & Rawlings (eds) *Law and Administration in Europe* at 134.

<sup>229</sup> Harlow & Rawlings *Law and Administration* 218 note that by 1989 nearly 100 local authorities have entered into such transactions and that those cumulatively accounted for one third of the sterling-based business in the market.

calculated with a floating rate of interest. As a result once interest rates fall, the party with the floating rate liability makes a profit. A local council can make use of such arrangements to hedge its fixed rate borrowing against interest rate reductions or may simply do so in order to raise revenue.<sup>230</sup> By the late 1980's, as interest rates started to rise and councils started making losses under these arrangements,<sup>231</sup> serious questions were being asked about the capacity of local authorities to enter into such agreements.<sup>232</sup> The matter came to a head in 1989 when a local auditor challenged the London Borough of Hammersmith and Fulham's power to enter into such agreements.<sup>233</sup> In the end the House of Lords ruled that local authorities lacked the power to enter into interest swap agreements.<sup>234</sup> It found that such transactions could not be described as "incidental to" councils' express borrowing or debt management powers<sup>235</sup> and in the absence of any other statutory mandate, were consequently *ultra vires*.<sup>236</sup> This case sparked a flood of related litigation, where local councils sought to escape from their interest

---

<sup>230</sup> The London Borough of Islington for example raised about £19.4 million by means of swap transactions: Harlow & Rawlings *Law and Administration* 225.

<sup>231</sup> Clarke & Otton-Goulder in Black, Muchlinks & Walker (eds) *Commercial Regulation and Judicial Review* 112 state that Hammersmith and Fulham's "losses would have totalled several hundred million pounds" by early 1989 and that although "[i]t was not possible at that date to calculate its exposure accurately ..., roughly speaking, Hammersmith was likely to lose a further £100 million for every 1 per cent rise in interest rates."

<sup>232</sup> Harlow & Rawlings *Law and Administration* 218; Freedland in Craig & Rawlings (eds) *Law and Administration in Europe* 134. This was despite earlier assurances from the Chartered Institute of Public Finance and Accountancy that councils could enter into such agreements as incidental to their borrowing and debt management powers.

<sup>233</sup> It should be noted, however, that the council itself argued for its own incapacity. The real defendants were in fact the banks who were the council's counterparties in these transactions: Harlow & Rawlings *Law and Administration* 219 – 220; Clarke & Otton-Goulder in Black, Muchlinks & Walker (eds) *Commercial Regulation and Judicial Review* 112.

<sup>234</sup> *Hazell v Hammersmith and Fulham London Borough Council* [1991] 1 All ER 545.

<sup>235</sup> The Local Government Act 1972 s 111 granted local authorities the "power to do anything (whether or not involving expenditure, borrowing or lending of money or the acquisition or disposal of any property rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions."

swap activities on lack of capacity grounds.<sup>237</sup> These cases illustrate the potentially devastating effect of applying a strict private law approach to capacity in state commercial activity.<sup>238</sup> The finding that the state lacked the capacity to enter into the agreement inevitably leads to the result that there is no contract, that is a complete escape from liability. It is particularly the inflexibility in the automatic result of contractual voidness following the finding of lack of capacity that is of concern here. In *Crédit Suisse v Allerdale Borough Council*<sup>239</sup> Neill LJ stated in response to an argument that the court should exercise a discretion in declaring the contract void:

I know of no authority for the proposition that the ultra vires decisions of local authorities can be classified into categories of invalidity ... Where a public authority acts outside its jurisdiction ... the decision is void. In the case of a decision to enter into a contract of guarantee the consequences in private law are those which flow where one of the parties to a contract lacks capacity.

I see no escape from this conclusion.

#### **2.4.2 A problem not unique to state commercial activity**

It may be argued that the concerns raised above are not unique to state contracting, but also apply to private juristic persons with limited capacity such as companies.<sup>240</sup> This argument is surely correct, but it should not lead one to conclude that capacity concerns in state commercial activity do not merit

---

<sup>236</sup> *Hazell v Hammersmith and Fulham London Borough Council* [1991] 1 All ER 545 at 558, 561, 566, 569.

<sup>237</sup> See Harlow & Rawlings *Law and Administration* 224 – 227.

<sup>238</sup> This problem is not restricted to interest swap transactions. For another English example of the same problem in a commercial context, see *Crédit Suisse v Allerdale Borough Council* [1996] 4 All ER 129 where a council escaped liability on a guarantee because of its lack of capacity to enter into the transaction. See Davies (2006) 122 *LQR* 98 at 101 for a discussion of this case and Cane (1994) 110 *LQR* 514 for a critical discussion of the judgement in the court *a quo*.

<sup>239</sup> [1996] 4 All ER 129 at 159.

<sup>240</sup> See Clarke & Otton-Goulder in Black, Muchlinski & Walker (eds) *Commercial Regulation and Judicial Review* 111; Harlow & Rawlings *Law and Administration* 220.

particular regulatory interest.<sup>241</sup> In fact the juristic person analogy merely reinforces the need to examine the ability of private law to provide effective regulation critically. If one focuses on incapacity in relation to private juristic persons, especially in a commercial context, it soon becomes apparent that special and specific rules had to be developed in order to address these concerns. In the realm of company law statutory intervention was required. Section 36 of the Companies Act<sup>242</sup> now states that contracts that are *ultra vires* simply because of a lack of capacity would not be invalid for that reason only. This section is clearly an attempt to overcome, or at least reduce, the impact of a strict contract law analysis of capacity questions in relation to companies' commercial activities.<sup>243</sup> The very existence of this section suggests that the common law was unable to effectively address capacity concerns in relation to companies. The parallel to public bodies may lead to the same conclusion.

The *ultra vires* concern is also much more acute in state contracting than in contracting by private juristic persons. State conduct can be *ultra vires* and hence void because the particular organ of state did not objectively have the power to enter into the transaction or because of much more "subjective" reasons such as a failure to take into account relevant considerations, an ulterior motive<sup>244</sup> or because its decision to enter into the contract was unreasonable.<sup>245</sup> While one may be able to justify a duty on counterparties to

---

<sup>241</sup> Clarke & Otton-Goulder in Black, Muchlinksi & Walker (eds) *Commercial Regulation and Judicial Review* 110 *et seq*; Harlow & Rawlings *Law and Administration* 220 – 221.

<sup>242</sup> Act 61 of 1973. The operative part of s 36 reads: "No act of a company shall be void by reason only of the fact that the company was without capacity or power so to act..."

<sup>243</sup> See Blackman, Jooste & Everingham *Commentary on the Companies Act Volume I* 4-17 – 4-28; Cilliers *et al Korporatiewe Reg* 177, 179 – 180; Fourie (1990) 1 *Stell LR* 388, (1988) 51 *THRHR* 218. An interesting question that I will not pursue here is what the effect of this section is on transactions of state companies, ie state commercial activity by means of state-owned companies. Will it also rescue contracts that are *ultra vires* for reasons other than exceeding company law limitations on the state company's capacity, ie public law limitations on capacity?

<sup>244</sup> On motive see par 2.5 below.

<sup>245</sup> See Clarke & Otton-Goulder in Black, Muchlinksi & Walker (eds) *Commercial Regulation and Judicial Review* 110 – 111. This is based on the assumption that public law requirements

ascertain the objective factors that limit state capacity or at least take into account the ability of counterparties to establish such factors, it seems hardly reasonable to adopt the same approach in relation to the more subjective factors. As Clarke & Otton-Goulder correctly state:

[I]t is possible by objective means available to all to ascertain the powers of a body, and hence for a third party to assess the risk it is running in concluding a contract with that body. One can look at a company's memorandum and articles of association: one can consider the relevant statutes, rules and regulations and form a view of the powers of a public body. A third party has no comparable right to discover the motives for a decision and the processes employed whereby that decision has been reached.<sup>246</sup>

Since the latter factors can lead to the unenforceability of a state contract just like the former set of factors, increased protection of private parties contracting with the state is required.

It may be that the limited ability of the state to engage in binding commercial activity should simply be viewed as a business or commercial risk to be discounted through normal market forces. On this view, private parties transacting with the state will internalise the potential risk and for example

---

will be applied to the process leading up to contracting despite the private law regulation of the activity under scrutiny, eg the contracting itself and the resultant relationship, as has generally been the case in South African law. However, even if one takes a much stricter approach to the application of private law regulation so that the general requirements of public law will not at all apply at any stage of the activity, these more "subjective" requirements limiting capacity may still come into play since such requirements are often found in empowering provisions where the granted discretion is in some way circumscribed. Limits on the purpose for which granted powers may be exercised, the contravention of which will lead to *ultra vires* conduct, have generally been interpreted as flowing from the statute itself and not some common law principle, see Van Dorsten (1985) 48 *THRHR* 341. It follows that even if public law rules are wholly excluded from application, a contract concluded for an improper purpose by the state may still result in such contract being void because of a lack of formal capacity on the part of the state.

<sup>246</sup> Clarke & Otton-Goulder in Black, Muchlinks & Walker (eds) *Commercial Regulation and Judicial Review* 110.

increase their price in order to offset any increased risk they perceive.<sup>247</sup> However, such a view does not necessarily solve the problem of the private party escaping liability in reliance on the state's incapacity, in other words where the risk hits the state. Perhaps such a position is still acceptable in that it ultimately places the risk of unenforceability because of incapacity on the state, which seems justified since the state is in the best position to minimise that risk. It is ultimately only the state itself that can ensure that it acts *intra vires*.<sup>248</sup> Current private law treatment of this situation, that is strictly voiding *ultra vires* contracts, is thus acceptable, even advantageous, because it creates an incentive for the state not to act *ultra vires*. The ultimate strength of this argument depends on empirical factors such as whether private parties transacting with the state are in fact able to pass the risk on to the state by means of higher prices. Furthermore, whether one finds this line of reasoning convincing may depend on whether one views the kind of opportunistic behaviour underlying an acceptance of this risk as (morally) acceptable.<sup>249</sup>

It is of interest to note that in the United Kingdom statutory mechanisms were introduced to address capacity issues in state contracting, although these mechanisms are limited to the local government level. In terms of the Local Government and Housing Act 1989<sup>250</sup> a lack of capacity on the part of a local authority to enter into a loan cannot prejudice the lender. The Local

---

<sup>247</sup> Davies talks of the danger of contractors tendering for government contracts only at highly inflated prices if they generally perceive government contracts to be associated with high risk: Davies (2006) 122 *LQR* 98 at 99, 101, 114 – 115. See also Cane (1994) 110 *LQR* 514 at 517 where it is argued that the result of the non-enforcement of the guarantee against the council in *Crédit Suisse v Allerdale Borough Council* [1996] 4 All ER 129 (with reference to the court *a quo*'s judgement) will be that "banks will be much less willing to lend to governmental bodies, and will charge much more when they do so, if they bear the risk that the body may be able to escape its obligations under the loan agreement on the ground that it was *ultra vires*."

<sup>248</sup> Cane (1994) 110 *LQR* 514 at 517.

<sup>249</sup> This means that one must be comfortable with a situation where the state can rely on its own failures, even bad faith conduct, to escape liability at its choosing, something which I must confess I do not.

<sup>250</sup> Section 44(6). The Local Government Act 1972 contained a similar provision: Clarke & Otton-Goulder in Black, Muchlinski & Walker (eds) *Commercial Regulation and Judicial Review* 111; Harlow & Rawlings *Law and Administration* 220.



Government (Contracts) Act 1997 also shields contracting parties from the potential unenforceability of a contract because of a lack of capacity on the part of a local authority.<sup>251</sup> This act creates a certification procedure in terms of which the local authority, with the consent of the counterparty, can issue a certificate regarding its capacity to enter into the contemplated contract.<sup>252</sup> When such certificate has been issued the contract will be effective and enforceable in private law irrespective of whether the local authority in fact had the capacity to enter into it.<sup>253</sup> The act furthermore provides for a damages claim in the case a certified contract is set aside on judicial review proceedings based on the fiction that the contract has been terminated because of a “repudiatory breach by the local authority.”<sup>254</sup>

### **2.4.3 Reliance on the doctrine of estoppel**

One mechanism in terms of which private law can potentially respond to the capacity problem in state contracting is the doctrine of estoppel by representation. In essence this doctrine prevents a party from relying on an actual state of affairs contrary to a representation it has made to a counterparty upon which the counterparty relied to its detriment.<sup>255</sup> Applied to

---

<sup>251</sup> Section 2(1).

<sup>252</sup> Local Government (Contracts) Act 1997 s 3(2)(d) states that for a contract to be a certified contract, the “local authority must have issued a certificate ... stating that the local authority had or has power to enter into the contract and specifying the statutory provision, or each of the statutory provisions, conferring the power.”

<sup>253</sup> Local Government (Contracts) Act 1997 s 2(1). The act is, however, of limited application and the deeming provision regarding capacity only applies to certified contracts: s 1(1). See Davies (2006) 122 *LQR* 98 at 116 – 119 and Clarke & Otton-Goulder in Black, Muchlinks & Walker (eds) *Commercial Regulation and Judicial Review* 121 who do not view the act as effectively solving the capacity concerns in state contracting.

<sup>254</sup> Local Government (Contracts) Act 1997 s 7(2). This claim is subject to any “discharge terms” which the parties may have agreed upon: s 6.

<sup>255</sup> The detriment does not have to be actual loss. It would suffice if the party relying on estoppel shows that it would suffer loss if the estoppel is not upheld. In other words, the possibility that a contract will be void if the estoppel plea is not successful with resultant loss to the relying party would be enough to satisfy the detriment requirement: Rabie & Sonnekus

the current context this would mean that once the state party has represented to the private counterparty that it has the capacity to enter into the transaction and in reliance on that representation the counterparty concluded the transaction, the state party will be barred, *estopped*, from later claiming that it in fact did not have the said capacity.<sup>256</sup> It follows that an application of the estoppel doctrine in state contracting cases would allow a private party to enforce a contract despite a lack of capacity on the part of the state.<sup>257</sup> There are, however, a number of impediments to such application of the doctrine of estoppel.

A major hurdle in the way of using estoppel as suggested above is the general rule that estoppel cannot validate that which is legally impossible.<sup>258</sup> This includes acts that are *ultra vires* in a narrow sense, that is, beyond the objective legal powers of the body concerned.<sup>259</sup> It is therefore well

---

*The Law of Estoppel in South Africa* 2 – 4, 104 – 111; Van der Merwe *et al Contract: General Principles* 29; De Wet & Van Wyk *Kontraktereg & Handelsreg* 22.

<sup>256</sup> It is not exactly clear if fault is a requirement for a successful estoppel plea in South African law. It seems that *dolus* is not required, so that it is not necessary to show that the state intentionally represented that it had capacity to enter into the transaction, knowing that it did not have such capacity, in order to mislead the counterparty to enter into the transaction. However, *culpa* may be a requirement depending on the circumstances of the case, so that it may be necessary to show that the state was negligent in representing that it was capable of concluding a binding agreement. However, requiring negligence in the current context will not create a particular problem, since it would be generally difficult for the state to deny negligence when it acted beyond its objective powers or failed to adhere to mandatory requirements in entering into the transaction. On the fault requirement, see Rabie & Sonnekus *The Law of Estoppel in South Africa* 133 – 165; Van der Merwe *et al Contract: General Principles* 30; De Wet & Van Wyk *Kontraktereg & Handelsreg* 22.

<sup>257</sup> Although estoppel only creates a defence and not a cause of action, it can operate to enforce a contract. If the state denies a contract because of lack of capacity, the private party can approach a court to enforce the averred contract and rely on estoppel as reply to the state's defence of incapacity: Rabie & Sonnekus *The Law of Estoppel in South Africa* 8 – 10.

<sup>258</sup> Rabie & Sonnekus *The Law of Estoppel in South Africa* 168 *et seq.*

<sup>259</sup> In *Strydom v Die Land- & Landboubank van SA* 1972 1 SA 801 (A) the court declared authoritatively at 816: “n Handeling van 'n statutêre liggaam wat in regte geen bestaan het omdat dit *ultra vires* daardie statutêre liggaam is, kan klaarblyklik nie deur estoppel tot 'n geldige of wesenlik afdwingbare handeling verhef word nie” (An action of a statutory body that legally does not exist because it is *ultra vires* that statutory body, cannot be transformed into a

established in South African law that estoppel cannot augment limited capacity.<sup>260</sup> Related to this is the rule that estoppel cannot enforce that which is against the law.<sup>261</sup> This would mean that a plea based on estoppel cannot succeed to overcome a failure to comply with mandatory legal requirements.<sup>262</sup> In relation to organs of state the justification for these rules are well-known. Allowing a plea based on estoppel to overcome limited powers would allow organs of state to extend their own limited powers by simply making representations.<sup>263</sup> This would clearly undermine the legality principle.<sup>264</sup> However, in recent years it has been argued that estoppel should

---

valid or enforceable action by estoppel (my translation)) and in *Trust Bank of Africa Ltd v Appletime Engineering (Pty) Ltd* 1981 1 SA 374 (D) at 377 the court said in relation to a company: "It cannot be bound by estoppel to do anything beyond its legal capacity." Rabie & Sonnekus *The Law of Estoppel in South Africa* 179 – 182; Ferreira (1991) 54 *THRHR* 388 at 391.

<sup>260</sup> *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2007 SCA 28 (RSA) at par 13; Rabie & Sonnekus *The Law of Estoppel in South Africa* 179, 182; Ferreira (1991) 54 *THRHR* 388 at 393.

<sup>261</sup> Rabie & Sonnekus *The Law of Estoppel in South Africa* 171 – 179; *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2007 SCA 28 (RSA) at par 16; *Mgoqi v City of Cape Town and Another*; *City of Cape Town v Mgoqi and Another* 2006 4 SA 355 (C) at par 145.

<sup>262</sup> *Trust Bank of Africa Ltd v Appletime Engineering (Pty) Ltd* 1981 1 SA 374 (D) at 377; *Strydom v Die Land- & Landboubank van SA* 1972 1 SA 801 (A) at 815 – 816; Rabie & Sonnekus *The Law of Estoppel in South Africa* 172 – 178; Ferreira (1991) 54 *THRHR* 388 at 391 – 393.

<sup>263</sup> *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 4 SA 661 (W) at par 31; Hoexter *Administrative Law in South Africa* 38 – 41; Baxter *Administrative Law* 400 - 402. One should be careful not to postulate from these rules a general rule that estoppel does not lie against the state. There is no such general rule in South African law and the courts have indeed applied estoppel against the state "where no statutory prohibition would be violated or duty left unfulfilled" by such application: *Mossel Bay Municipality v Ebrahim* 1952 1 SA 567 (C) at 574; Cockrell in Bennett *et al* (eds) *Administrative Law Reform* 239; Ferreira (1991) 54 *THRHR* 388 at 395.

<sup>264</sup> Ferreira (1991) 54 *THRHR* 388 at 396; Hoexter *Administrative Law in South Africa* 39; for further justifications see *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2007 SCA 28 (RSA) at par 15.

be developed to at least have some application in this context.<sup>265</sup> In *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd*<sup>266</sup> Boruchowitz J stated:

A rule of law which permits an organ of State, through its own carelessness or neglect, to deprive the defendant of a statutory right of recourse and then to render itself immune from a defence to that deprivation, which estoppel would offer the defendant is, in my view, inconsistent with the culture of justification of which the right to reasonable administrative action is an important part. To permit the plaintiff to take advantage of the established rule against the raising of an estoppel where there is no alleged or minimal countervailing benefit to the plaintiff would, to my mind, be inconsistent with the entrenched constitutional value of reasonable public administration.

He accordingly ruled that the common law rules of estoppel should be developed so that there is no longer any blanket barrier against the application of the doctrine in cases involving statutory limits on the state.<sup>267</sup> Instead he argued that

the proper approach, consistent with s 39(2) of the Constitution, is that the Court should balance the individual and public interests at stake and decide on that basis whether the operation of estoppel should be allowed in a specific case.<sup>268</sup>

---

<sup>265</sup> *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 4 SA 661 (W) at par 33; De Ville *Judicial Review of Administrative Action in South Africa* 97; Cockrell in Bennett *et al* (eds) *Administrative Law Reform* 239 – 240; Visser & Potgieter *Estoppel: Cases and Materials* 307; Sonnekus (2003) 66 *THRHR* 684; Ferreira (1991) 54 *THRHR* 388 at 397 – 399. Also note the not-so-recent argument by Hoexter JA in his minority judgement in *Trust Bank van Afrika Bpk v Eksteen* 1964 3 SA 402 (A) at 415.

<sup>266</sup> 2001 4 SA 661 (W) at par 37.

<sup>267</sup> *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 4 SA 661 (W) at par 40.

<sup>268</sup> *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 4 SA 661 (W) at par 40. This strongly resembles the approach advocated by Ferreira (1991) 54 *THRHR* 388 at 398 – 399.

This judgement provides a strong indication that estoppel may be able to provide effective regulation of at least some of the concerns regarding capacity in state commercial activity.<sup>269</sup>

It is evident that estoppel will only be an effective mechanism, if developed along the lines suggested in *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd*,<sup>270</sup> to keep the state from escaping liability on capacity grounds. The state itself will not be able to rely on estoppel, based on its own representations, when the counterparty seeks to escape liability on capacity grounds.<sup>271</sup> At best estoppel can thus only address part of the capacity concerns in this context. Opportunistic behaviour by the private counterparty will remain a concern.

In *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd*,<sup>272</sup> however, the Supreme Court of Appeal expressly rejected Boruchowitz J's approach in *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd*.<sup>273</sup> Ponnan JA reaffirmed the established position in relation to estoppel defences against public bodies, stating: "Estoppel cannot ... be used in such a way as to give effect to what is not permitted or recognised by law. Invalidity must therefore follow uniformly as the consequence."<sup>274</sup> The judge

---

<sup>269</sup> The approach has since been followed in *RPM Bricks (Pty) Ltd v City of Tshwane Metropolitan Municipality* 2007 JOL 19649 (T) at par 36 and *Choice Decisions v MEC, Department of Development, Planning and Local Government, Gauteng, and Another (No 1)* 2003 6 SA 280 (W) at 288 and is also welcomed by Sonnekus (2003) 66 *THRHR* 684.

<sup>270</sup> 2001 4 SA 661 (W).

<sup>271</sup> Van der Merwe *et al Contract: General Principles* 29.

<sup>272</sup> 2007 SCA 28 (RSA) at par 25.

<sup>273</sup> 2001 4 SA 661 (W). See also *Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd* 2001 4 SA 142 (SCA), which was decided more or less at the same time as Boruchowitz J's judgement and in which Marais JA stated at par 11: "It is settled law that a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance upon the doctrine of estoppel."

<sup>274</sup> *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2007 SCA 28 (RSA) at par 23.

found nothing in the Constitution that could justify a departure from this position.<sup>275</sup>

## **2.4.4 Restitution or enrichment claims**

### **2.4.4.1 English law restitution**

In English law the unfortunate consequences of the strict application in the local council interest swaps cases of the *ultra vires* doctrine, and resultant incapacity of the state contractor, were countered by development of a private

---

<sup>275</sup> *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2007 SCA 28 (RSA) at par 24: "With respect to Boruchowitz J, what he postulates is, in my view, the antithesis of that demanded by the Constitution. Section 173 of the Constitution enjoins courts to develop the common law by taking into account the interests of justice. The approach advocated by the learned judge, if endorsed, would have the effect of exempting courts from showing due deference to broad legislative authority, permitting illegality to trump legality and rendering the *ultra vires* doctrine nugatory. None of that would be in the interests of justice. Nor, can it be said, would any of that be sanctioned by the Constitution, which is based on the rule of law, and at the heart of which lies the principle of legality." However, the judge emphasised at par 11 – 12 that an estoppel plea will only be barred in relation to "an act beyond or in excess of the legal powers of a public authority", but not in relation to "the irregular or informal exercise of power granted." A lack of capacity will fall into the first of these two categories with the result that estoppel cannot assist to enforce a contract against the state where the state lacked the power to enter into the particular transaction. See Rabie & Sonnekus *The Law of Estoppel in South Africa* 181 – 182 who argue in favour of the development of the estoppel doctrine in relation to (mandatory) internal procedures, the compliance with which the private counterparty cannot easily verify. Note also Sonnekus' argument that, quite apart from the particular rule barring an estoppel plea under discussion here, a reliance on estoppel should not succeed where the averred representation relates to statutory limitations on the state, which the counterparty can verify. In such a case, Sonnekus argues, the first requirement for a successful plea of estoppel, viz a representation, will not be fulfilled since the requirements are set in legislation which a reasonable person would take account of: Sonnekus (2004) 67 *THRHR* 171. Cf *East London Municipality v Legate* 1915 AD 313 where a claim for damages resulting from an *ultra vires* contract with the local council was refused because the contract was contrary to the council's statutory powers, which the court reasoned the private party could easily have established for himself. Also note, however, Baxter *Administrative Law* 401, who describes the denial of a plea of estoppel against the state based on imputed knowledge of statutory limits to public powers as the "least convincing" of the justifications for such a denial.

law remedy of restitution.<sup>276</sup> In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*; *Kleinwort Benson Ltd v Sandwell Borough Council*,<sup>277</sup> combined cases similar in facts to that of *Hazell v Hammersmith and Fulham London Borough Council*,<sup>278</sup> the courts allowed restitution claims to the banks based on the voidness of the contracts. This was a new development in English law of restitution, which prior to these judgements did not recognise “absence of consideration” following an *ultra vires* and hence void contract as a ground for restitution.<sup>279</sup> The effect of the remedy was that the banks could reclaim the money lent to the councils under the *ultra vires* contracts to the amount that they were still out of pocket.<sup>280</sup> However, in the later judgement in *Kleinwort Benson Ltd v Birmingham City Council*<sup>281</sup> the court held that the nett position of the claimant should be ascertained with reference to the specific transaction under scrutiny only. The fact that the claimant in that case was not out of pocket or impoverished following the voidness of the state contract, because it had entered into a further balancing contract, which covered any losses it might have suffered under the state contract, was held to be irrelevant.<sup>282</sup> Only the payments made by the state party under the void contract can thus be taken into account to determine the amount that the private counterparty can reclaim in restitution. It seems that

---

<sup>276</sup> Seddon *Government Contracts* 78; Freedland in Craig & Rawlings (eds) *Law and Administration in Europe* 134; Harlow & Rawlings *Law and Administration* 224 – 227.

<sup>277</sup> [1994] 4 All ER 890, *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] 2 All ER 961.

<sup>278</sup> [1992] 2 AC 1. See par 2.4.1 above for a discussion of the English local council interest swaps cases.

<sup>279</sup> Harlow & Rawlings *Law and Administration* 226; Cane (1994) 110 *LQR* 514 at 521.

<sup>280</sup> *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*; *Kleinwort Benson Ltd v Sandwell Borough Council* [1994] 4 All ER 890 at 929. Seddon *Government Contracts* 79; Harlow & Rawlings *Law and Administration* 226.

<sup>281</sup> [1996] 4 All ER 733.

<sup>282</sup> *Kleinwort Benson Ltd v Birmingham City Council* [1996] 4 All ER 733 at 742 (per Evans LJ), 744 (per Saville LJ), 749 (per Morritt LJ). Harlow & Rawlings *Law and Administration* 226.

the focus of the inquiry under the restitution analysis is the enrichment of the state party.<sup>283</sup>

#### 2.4.4.2 Unjustified enrichment in South African law

In South African law unjustified enrichment may also provide solutions to the problems regarding limited state commercial capacity.<sup>284</sup> However, the adherence to the existing Roman Dutch enrichment actions in South African law to the exclusion of a general enrichment action<sup>285</sup> limits the flexibility of

---

<sup>283</sup> This is evident from the statements in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*; *Kleinwort Benson Ltd v Sandwell Borough Council* [1994] 4 All ER 890 at 929 (per Hobhouse J at first instance): “The principle is [that] ... it is unconscionable that the recipient should retain the money ... in so far as the recipient has made cross-payments to the payer, the recipient has ceased to be enriched...” and at 967 (per Leggatt LJ in the Court of Appeal): “[I]n circumstances such as these they [the council] should not be unjustly enriched.” Harlow & Rawlings *Law and Administration* 226 – 227.

<sup>284</sup> I am not suggesting here that the civilian concept of unjustified enrichment and the common law remedies of restitution are equivalent or synonymous. They clearly are not and restitution in English law encompasses a much wider range of remedies than unjustified enrichment in South African law. My point here is simply that the use of restitution remedies based on unjustified enrichment in English law may suggest a similar approach towards effective private law regulation of similar concerns in South African law. On the differences between common law restitution and civilian unjustified enrichment, see Visser in Zimmermann & Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* 523 et seq, Van Zyl (1996) 21 *Journal for Juridical Science* 1; De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 151.

<sup>285</sup> *Nortje en 'n Ander v Pool* NO 1966 3 SA 96 (A); *Kommissaris van Binnelandse Inkomste v Willers* 1994 3 SA 283 (A). In *McCarthy Retail Ltd v Shortdistance Carriers* CC 2001 3 SA 482 (SCA) the court came as close as possible to the recognition of a general enrichment action without actually establishing such general action in South African law. Following this judgement, it is only a matter of time before a general enrichment action will be authoritatively established in South African law. For the discussion that follows, it is noteworthy that the court did not envisage a radical departure from the existing requirements for specific enrichment actions under a future general action. Of particular importance for present purposes is the court's remarks at par 10 regarding the future recognition of a general action: “This does not mean, however, that the old structure's relatively few distinctive rules applying only to particular forms of action, such as the requirement in the *condictio indebiti* that the mistake should be reasonable, will disappear.” See also *First National Bank of Southern*



this private law remedy as a regulatory tool when compared to the development in English law noted above. A private counterparty faced with a situation where the state entered into a transaction without the necessary power or capacity may be able to recover some of its performance under the transaction from the state in terms of the *condictiones sine causa*. The basis of these actions is the transfer of wealth from one estate to another *sine causa*.<sup>286</sup> However, success will depend on whether it can satisfy the specific requirements of any of these *condictiones*.

#### **2.4.4.2.1 *Condictio indebiti***

The primary *condictio sine causa* in South African law is the *condictio indebiti*.<sup>287</sup> Under this action the claimant can recoup its performance<sup>288</sup> if it performed under the mistaken impression that such performance was due.<sup>289</sup> This would be the case when a party performs under a contract which later turns out to be void *ab initio*.<sup>290</sup> The Supreme Court of Appeal has accordingly stated: “I would have thought that an *ultra vires* payment represents a prime example for a payment *indebite*.”<sup>291</sup> Up until the judgement in *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue*<sup>292</sup> the

---

*Africa Ltd v Perry NO and Others* 2001 3 SA 960 (SCA) at par 23. De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 153, 311 *et seq*; Visser in Zimmermann & Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* 554 – 555; Pretorius (1995) 58 *THRHR* 331; Visser 1994 *TSAR* 825; Eiselen (1992) 55 *THRHR* 124; Sonnekus (1992) 55 *THRHR* 301.

<sup>286</sup> *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 3 SA 960 (SCA) at par 22; De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 29; Sonnekus (1992) 55 *THRHR* 301 at 304 – 306.

<sup>287</sup> De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 171. See also more generally Zimmermann *The Law of Obligations* 866 *et seq*.

<sup>288</sup> To the maximum value of that remaining in the recipient's hands.

<sup>289</sup> De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 23 – 24.

<sup>290</sup> De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 24.

<sup>291</sup> *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd* 1997 2 SA 35 (A) at 40. See also *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 5 SA 193 (SCA) at par 15.

<sup>292</sup> 1992 4 SA 202 (A).

claimant's mistake in performing had to relate to fact and not law. Following that judgement a mistake of law can also found a *condictio indebiti* provided such mistake, like one of fact, is excusable.<sup>293</sup> Although this development is an important one for the viability of an enrichment claim in instances of *ultra vires* state transactions, the requirement regarding mistake still presents an obstacle to such action. Prior to the development in *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue*<sup>294</sup> a claim under the *condictio indebiti* for the return of a performance under an *ultra vires* state contract may have met with difficulty where voidness followed from the overstepping of the state's limited capacity since it is arguable that the mistake in such an instance is one of law.<sup>295</sup> Following *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue*<sup>296</sup> characterisation of the mistake as one of law should no longer bar an enrichment claim. However, the element of excusability in the requirement of mistake may still provide an obstacle.<sup>297</sup> As Visser indicates in his discussion of the pandectist view of mistake as a requirement for the *condictio indebiti*, the distinction between errors of law and errors of fact may be linked to the distinction between excusable and inexcusable errors.<sup>298</sup> While errors of fact may *prima facie* be viewed as excusable, errors of law may not.<sup>299</sup> An argument very similar to the one potentially undermining a successful reliance on estoppel in the present instance<sup>300</sup> may thus also undercut an approach based on the *condictio indebiti*. If the contract is void because of the lack of

---

<sup>293</sup> Visser in Zimmermann & Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* 528 – 533.

<sup>294</sup> 1992 4 SA 202 (A).

<sup>295</sup> See *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*; *Kleinwort Benson Ltd v Sandwell Borough Council* [1994] 4 All ER 890 at 931, 934.

<sup>296</sup> 1992 4 SA 202 (A).

<sup>297</sup> For similar reasons the defence that the claimant performed knowing that the performance was not due presents particular difficulty in the present context, especially when imputed knowledge of public documents is brought into the picture.

<sup>298</sup> Visser in Zimmermann & Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* 529 – 531. See also Zimmermann *The Law of Obligations* 870.

<sup>299</sup> Visser in Zimmermann & Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* 530. See also Zimmermann *The Law of Obligations* 870.

<sup>300</sup> See note 269 above.

capacity on the part of the state and such limited capacity flows from specific statutory provisions, the private counterparty's mistake in performing may not be excusable to the extent that it could objectively have verified the state's capacity.<sup>301</sup> In *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue*<sup>302</sup> the court expressly left the exact standard for excusability open, simply stating: "[I]f the payer's conduct is so slack that he does not in the Court's view deserve the protection of the law, he should, as a matter of policy, not receive it."<sup>303</sup> However, the court's application of this open standard to the facts in that case does provide considerable pointers for the present context. In finding the claimant's error excusable, the court stated:

He [the claimant] cannot be blamed for turning to, or for accepting the ruling of, the official to whom the administration of the Act has been entrusted and to whom members of the public would naturally turn for guidance.<sup>304</sup>

Similar reasoning may also excuse the mistake of a private counterparty performing under an *ultra vires* contract where the state party asserted the power to enter into the transaction. Only in the most obvious cases of lack of capacity, for example where a clearly applicable statute plainly limits the

---

<sup>301</sup> But see Hobhouse J's statements in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*; *Kleinwort Benson Ltd v Sandwell Borough Council* [1994] 4 All ER 890 at 934 where he stated in relation to the defence that performance was voluntary: "If the facts were that these payments had been made with a conscious appreciation that the contracts were or might be void, that would normally suffice to negative any right of recovery. They would be voluntary payments. But, unless there was such an actual conscious appreciation, the principle cannot be applied. It does not suffice that a fully informed investigation of the legal position leading to the correct conclusions in law would have disclosed that the councils did not have the capacity to enter into the contracts." It was precisely in order to avoid such obstacles relating to the requirement of mistake that Hobhouse J highlighted the equitable basis of the claim, stating at 929 that "it is unconscionable that the recipient should retain the money. Neither mistake nor the contractual principle of total failure of consideration are the basis for the right of recovery."

<sup>302</sup> 1992 4 SA 202 (A).

<sup>303</sup> *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 4 SA 202 (A) at 224. See also *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd* 1997 2 SA 35 (A) at 44.

<sup>304</sup> *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 4 SA 202 (A) at 225 – 226.

power of the relevant organ of state, should the private counterparty's reliance on the state's capacity to conclude the transaction qualify as an inexcusable error of law.<sup>305</sup> However, as the court emphasised in *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue*,<sup>306</sup> excusability can only be determined in a particular case on the facts of that specific instance. Views are bound to differ on this matter, as the minority judgement of Van den Heever JA in that case illustrates. If one were to apply his approach to the context of state commercial activity an enrichment action will provide an effective remedy to the private counterparty when faced with a contract beyond the state's capacity in considerably fewer instances. Of note is Van den Heever JA's remarks that

[t]he citizen in his relationship with the State, though no longer expected to be legally omniscient, has a duty to acquaint himself with the various laws or regulations applicable to the particular occupation in which he engages...<sup>307</sup>

Despite these potential difficulties in applying the requirements of the *condictio indebiti* to reclaim performance under an *ultra vires* state contract there is considerable judicial precedent for allowing such a claim in South African law.<sup>308</sup>

---

<sup>305</sup> In my view, Sue Arrowsmith's remarks in relation to English law also hold true in the South African context, when she states that "the scope of public authorities' statutory powers is notoriously uncertain, and a contractor cannot reasonably be expected to know whether or not a contract is *ultra vires*": Arrowsmith (1989) 9 *Legal Studies* 307 at 311 – 312.

<sup>306</sup> 1992 4 SA 202 (A) at 224.

<sup>307</sup> *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 4 SA 202 (A) at 227.

<sup>308</sup> See *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 5 SA 193 (SCA) at par 15; *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd* 1997 2 SA 35 (A) at 42: "There is thus sufficient authority to the effect that an *ultra vires* payment can be reclaimed with the *condictio indebiti* or, at the very least, the *condictio sine causa*. There is nothing to the contrary and there is no reason to overrule the quoted cases. They make in this regard good sense"; *WP Koöperatief Bpk v Louw* 1995 4 SA 978 (C) at 988: "Op die inligting tans voor my blyk dit dus minstens argumenteerbaar te wees dat die voorskotte gemaak deur die applikant strydig is met die magte wat hom verleen word kragtens die Koöperasiewet en sy statute, en dat dit derhalwe *ultra vires* en nietig is ... Dit is dus duidelik dat die applikant minstens, indien hierdie betalings nietig was, 'n verrykingseis ... sou hê" (Upon the facts now

#### 2.4.4.2.2 Enrichment claims dependent on an exclusively private law analysis

The success of unjustified enrichment as regulatory tool in the present instance depends to a large degree on an exclusively private law analysis of state commercial activity. An enrichment claim will generally only be available if the state contract is void *ab initio* as a result of the lack of capacity. This would be the outcome in an exclusively private law analysis. However, when the question of capacity is analysed in terms of public law the viability of a subsequent enrichment claim may be significantly reduced. When the state's capacity to engage in particular activity is analysed in terms of public law as a question of lawfulness the result of a finding of unlawful action, that is action beyond its capacity, is not necessarily that the relevant action or contract is void *ab initio*. In the public law analysis, the court has a discretion in ordering the concluded contract void *ab initio*. Although a court must declare action that is inconsistent with the Constitution invalid, which would be the case where state action exceeding limited capacity is found to be unlawful in terms of section 33 of the Constitution, the court has a discretion to order invalidity to operate retrospectively or only prospectively.<sup>309</sup> An order of invalidity that operates only prospectively will effectively close the door to a subsequent enrichment action.

---

before me it seems at least arguable that the advances made by the applicant are in conflict with the powers granted to him by the Co-operative Societies Act and its statutes and that it is therefore *ultra vires* and void. It is thus clear that the applicant would at least have a enrichment claim, should these payments be void (my translation)); *Volkskas Beleggingskorporasie Bpk v Oranje Benefit Society* 1978 1 SA 45 (A) at 59; *Amalgamated Society of Woodworkers of SA and Another v Die 1963 Ambagsaal-vereniging* 1967 1 SA 586 (T) at 596 – 597 (allowing an enrichment claim where a company has performed beyond its capacity).

<sup>309</sup> Constitution s 172. See also the discretionary nature of the remedies listed in s 8 of PAJA and De Ville *Judicial Review of Administrative Action in South Africa* 326 – 331.

#### 2.4.4.2.3 Policy factors underlying enrichment claims

There seems to be conflicting policy considerations underlying enrichment claims in instances of *ultra vires* state contracts. On the one hand, where the state has performed there are strong arguments in favour of allowing an enrichment action. In such instances unjustified enrichment can provide an effective regulatory mechanism to maintain the primary policy considerations that informed the limitation of the state's capacity. Allowing the state to reclaim its performance will protect public funds from unlawful expenditure.<sup>310</sup> On the other hand, where the state has received performance and the private counterparty is impoverished, allowing an enrichment claim may be tantamount to allowing enforcement of the *ultra vires* contract.<sup>311</sup> The policy considerations underlying the *ultra vires* status of the contract will hence work against an enrichment action.<sup>312</sup> In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*; *Kleinwort Benson Ltd v Sandwell Borough Council*,<sup>313</sup> Hobhouse J declared with regard to a restitution claim based on unjustified enrichment:

The application of the principle is subject to the requirement that the courts should not grant a remedy which amounts to the direct or indirect enforcement of a contract which the law requires to be treated as ineffective.

Sue Arrowsmith, however, makes the important point that the *ultra vires* nature of the performance, where an enrichment claim is allowed to the private counterparty against the state, should not in principle serve as a bar to such claim.<sup>314</sup> She points out that all delictual actions of the state are *ultra vires*, but that such characterisation cannot stand in the way of a delictual claim against the state.<sup>315</sup> This insight highlights the fact that protecting public

---

<sup>310</sup> Seddon *Government Contracts* 76 – 77.

<sup>311</sup> Especially where the private party's performance was in the form of a *factum* and the enrichment claim amounts to reasonable compensation for the benefit conferred on the state.

<sup>312</sup> Arrowsmith (1989) 9 *Legal Studies* 307 at 310; Seddon *Government Contracts* 79 – 80, 212.

<sup>313</sup> [1994] 4 All ER 890 at 929.

<sup>314</sup> Arrowsmith (1989) 9 *Legal Studies* 307 at 311.

<sup>315</sup> See also Seddon *Government Contracts* 80.

funds is not the only policy consideration relevant to the desirability of allowing a claim, delictual or in enrichment, in such instances. Arrowsmith opines that the interests protected by an enrichment claim should outweigh the protection of public funds, similar to the position regarding delictual liability of the state.<sup>316</sup> This reasoning, while certainly persuasive, will not easily be accepted in current South African law, where courts have increasingly denied delictual liability of the state in protection of public funds vis-à-vis protection of private interests.<sup>317</sup>

#### **2.4.5 Delictual liability for *ultra vires* acts**

The door to delictual liability as a private law mechanism of addressing capacity concerns in state commercial activity seems to have been closed by the Constitutional Court judgement in *Steenkamp NO v Provincial Tender Board, Eastern Cape*.<sup>318</sup> In that case an initially successful tenderer approached the court for delictual damages after the contract was set aside in a judicial review application by one of the unsuccessful tenderers.<sup>319</sup> The contract was set aside by the review court on the grounds that the decision to award the contract (*inter alia* to the present applicant) was tainted by an “unwarranted adherence to a fixed principle”, “a misconception of the nature of the discretion conferred”, the consideration of irrelevant factors and a failure to consider relevant ones, bias and gross unreasonableness.<sup>320</sup> The applicant claimed only out-of-pocket expenses relating to costs incurred in

<sup>316</sup> Arrowsmith (1989) 9 *Legal Studies* 307 at 311.

<sup>317</sup> See par 2.3.2.3 above and par 2.4.5 below.

<sup>318</sup> 2007 3 SA 121 (CC).

<sup>319</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 7 – 8.

<sup>320</sup> *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others* 1999 1 SA 324 (CkH) at 348. On these facts the matter is clearly to be distinguished from *East London Municipality v Legate* 1915 AD 313 where the claim for expenses was also refused, but on the grounds that the contract was objectively beyond the statutory powers of the local council and the counterparty could have ascertained such legal position itself and was therefore imputed with knowledge of the *ultra vires* status of the council's conduct.

implementing the contract prior to it being set aside on review.<sup>321</sup> It lost, both in the Supreme Court of Appeal<sup>322</sup> and in the Constitutional Court.<sup>323</sup> Both courts listed policy reasons against placing a legal duty on the state in its contracting activity that could sustain a claim for damages.<sup>324</sup> This outcome is regrettable. It closes off delict as an avenue that could have yielded some private law regulation of *ultra vires* problems in state contracting.<sup>325</sup> Recognition of a claim for out-of-pocket expenses incurred in performance under the contract that was subsequently set aside would have achieved a much needed balance between protection of state interests and that of the private counterparty. While the state interest is protected by the fact that the contract is set aside, the performing private counterparty is left out-of-pocket, very much like the banks in the English interest swap cases.<sup>326</sup>

The Constitutional Court's argument that the private party should rather protect itself against this eventuality by means of contractual provisions<sup>327</sup> is not convincing.<sup>328</sup> It is difficult to see how a contractual provision could protect the private counterparty against *ultra vires* and in particular capacity problems such as those under discussion here. If the contract is set aside on review, why would one provision, contemplating just such an event, survive to provide the private counterparty with a cause of action? Such a provision

---

<sup>321</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 11.

<sup>322</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA).

<sup>323</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC).

<sup>324</sup> See par 2.3.2 above for a discussion of these policy considerations.

<sup>325</sup> Especially in relation to problems arising from the more "subjective" factors causing action to be *ultra vires*, ie those that relate to the procedure in terms of which the contract was concluded rather than the more easily verifiable objective factors relating to the state's formal capacity to enter into transactions.

<sup>326</sup> See par 2.4.1 above.

<sup>327</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 50: "[A] prudent successful tenderer may ... negotiate the right to restitution of out-of-pocket expenses should the tender award be set aside ... A negotiated or contractual remedy of this order is likely to be effective because it would be tailored to the peculiar facts connected to the actual delivery of supplies and services to the state."

<sup>328</sup> See also the dissenting minority's argument why this reasoning cannot be accepted: *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 89.



would be tainted by the reviewable irregularity to the same extent as the rest of the contract. If Moseneke DCJ is contemplating a separate, and somehow independent, contractual arrangement from the main tender contract, all the concerns regarding capacity or *ultra vires* conduct are simply duplicated.<sup>329</sup>

## 2.5 Goal 4: Restraining the state's motives or purposes

The final regulatory goal to come under scrutiny is restraining the motive or purpose<sup>330</sup> of the state in its commercial activity. Although motive also impacts on capacity and as such was already noted in paragraph 2.4 above, the concern there was on the effect of action taken for an improper motive or purpose, resulting in a lack of capacity. Here I am specifically focusing on the regulation of motive itself. In other words, in this paragraph I am not looking at motive or purpose as part of the objective scope of state powers, but rather as a pervasive underlying concern in all state action. There are a number of reasons why one would be concerned about the state's motives. One of these relates to the notion that all state action should be grounded in the public interest. In other words, the public interest should be the aim of all state action at some level.<sup>331</sup> Another reason is the foundational values of

---

<sup>329</sup> There are indications in this part of the judgement that Moseneke DCJ is approaching the matter in terms of a classification approach, as discussed in chapter three above. He seems to suggest that while the tender process leading to the award of the tender is open to public law review and hence liable to be set aside on *ultra vires* grounds, the negotiation and conclusion of these further terms of the agreement are simply private conduct, not open to public law challenge. If this is indeed an accurate analysis of his reasoning, it is just another illustration of the untenability of the classification approach. It makes no sense to view the conclusion of one part of the agreement as subject to public law regulation and another part as only subject to private law regulation.

<sup>330</sup> The terminology of motive and purpose is not always clear. Strictly speaking one may view these as separate notions. Purpose will then only refer to the objective aim of or reason for the action. Motive, on the other hand, then only refers to the more subjective factors driving the action. However, it is difficult to consistently keep these terms apart and I will use them interchangeably to refer to the general aim of state action. See De Ville *Judicial Review of Administrative Action in South Africa* 173; Hoexter *Administrative Law in South Africa* 275 – 277; Van Dorsten (1985) 48 *THRHR* 381 at 389 – 390; Baxter *Administrative Law* 512 – 515.

<sup>331</sup> See chapter three par 3.4 above for a discussion of this notion.

openness, transparency and accountability enshrined in the Constitution.<sup>332</sup> Section 195 of the Constitution, for example, puts it beyond any doubt that the public has a legitimate interest in scrutinising the administration's aims, whatever the action may be. There is no reason to believe that these rationales do not apply to state commercial activity. In fact, the use of public money or public assets, inherent in state commercial activity, creates an added justification for the regulation of the state's motives. The question considered below is to what extent private law can manage such regulation.

### 2.5.1 *Mustapha* once more

In classic private law analysis a party's motives for entering into a transaction hardly ever reach the surface of analysis. A party's motives for concluding a contract or exercising a right in terms of a contract is largely considered irrelevant in private law analysis. The contrast between this traditional private law approach and the regulatory concerns associated with the state's motives is nowhere better illustrated than in the notorious case of *Mustapha and Another v Receiver, Lichtenburgh and Others*.<sup>333</sup> In that case the applicants argued that the termination of the permit was invalid because of the administrator's acknowledged discriminatory motive.<sup>334</sup> Schreiner JA thus described the case in his minority judgement<sup>335</sup> as one "concerned with the exercise of power from a wrong motive."<sup>336</sup> In rejecting the applicants' argument, Ogilvy Thompson AJA stated for the majority:

In the case of a private individual who is a party to a contract, his reasons or motives for exercising an admitted right of cancellation of that contract are normally irrelevant.<sup>337</sup>

---

<sup>332</sup> See the Preamble, s 32, s 33(2), s 36(1), s 39(1)(a), s 195(1)(g), s 217(1).

<sup>333</sup> 1958 3 SA 343 (A).

<sup>334</sup> See chapter three at par 3.2.1 above for a discussion of this case.

<sup>335</sup> Now considered to be correct, see *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) at par 13.

<sup>336</sup> *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 348.

<sup>337</sup> *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 358. For a similar argument in terms of English law, but extending to the state's motives, see Daintith (1979) 32 *Current Legal Problems* 41 at 42.

The majority's classification of the state's termination of the permit as simply an exercise of a (private) contractual right meant that the motive could be ignored. Even Schreiner JA's dissenting judgement confirmed the irrelevance of motive in a private law analysis, where he stated:

For no reason or the worst of reasons the private owner can exclude whom he wills from his property and eject anyone to whom he has given merely precarious permission to be there.<sup>338</sup>

It follows that whichever judgement one considers as most convincing<sup>339</sup> a strict private law analysis of state contracting denies motive any significant role.

### **2.5.2 Controlling motive through implied terms**

Ogilvy Thompson AJA, however, noted one way in which contract law can in fact control motive in state contracting. This is by means of implied terms.<sup>340</sup> Contract law will thus invalidate an exercise of a contractual right for a specific reason, where a term can be implied that such right is to be exercised for different reasons only, or at least not for the reason relied upon. It is not exactly clear from the judgement whether the judge had a truly implied term in mind, that is a term implied by law, or whether he was referring to a tacit term, that is a term agreed upon by the parties to the specific contract, but not

---

<sup>338</sup> *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 347. His dissent thus did not turn on a larger role for motive in private law analysis, but rather on his view that the termination of the permit amounted to the exercise of statutory powers where the public law concern regarding motive did apply.

<sup>339</sup> Or even correct, given that the majority judgement was most recently overruled in favour of the minority judgement: *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) at par 13.

<sup>340</sup> *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 359: "To succeed in challenging the exercise by a public officer of an admitted contractual right to cancel on notice an existing contract on the ground that the reason for such cancellation is bad in law, it seems to me that the challenger must establish the existence of an implied term in the contract in question to the effect that the admitted right to cancel on notice will not be exercised for invalid reasons, or, at least, not for the particular reason specifically complained of."

expressed.<sup>341</sup> His references regarding implying the term into the specific contract seem to suggest that he had a tacit term in mind. Irrespective of whether the approach is based on an implied or a tacit term, it does not result in particularly strong regulation of motives in commercial transactions for a number of reasons.

Firstly, there is generally no requirement for a party to reveal its motives for acting,<sup>342</sup> except if such disclosure is contractually required, which is bound to be rare. It may thus be very difficult (in many cases indeed impossible) for the counterparty to show an improper motive even where the requisite term can be implied.<sup>343</sup>

Secondly, terms are not easily implied. In the case of tacit terms courts are extremely reluctant to “make contracts for people” by implying terms which are not expressed.<sup>344</sup> Terms placing significant restrictions on motives or requiring the disclosure of motives in the exercise of contractual rights will not easily meet the rather onerous “bystander test” applied by the courts to establish tacit terms.<sup>345</sup> It is especially difficult to see how such terms would

---

<sup>341</sup> On the difference between these two types of terms see *A Becker & Co (Pty) Ltd v Becker and Others* 1981 3 SA 406 (A) at 491; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) at 525 – 526, 531 – 532; *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 3 SA 188 (AD) at 197.

<sup>342</sup> *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 349 (per Schreiner JA), 358 (per Ogilvy Thompson AJA).

<sup>343</sup> See Van Dorsten (1985) 48 *THRHR* 381 at 405.

<sup>344</sup> *Wilkins NO v Voges* 1994 3 SA 130 (A) at 143; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) at 525. See also Davies in Freedland & Auby (eds) *The Public/Private Law Divide* 126.

<sup>345</sup> The “bystander test” is often described with reference to Scrutton LJ’s statement in *Reigate v Union Manufacturing Co (Ramsbottom) Ltd and Elton Cap Dyeing Co Ltd* [1918] 1 KB 592 (CA) (118 LT 479) at 605 (KB) (483 (LT)): “You must only imply a term if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that you can be confident that if at the time the contract was being negotiated someone had said to the parties: ‘What will happen in such a case?’ they would have both replied: ‘Of course, so-and-so. We did not trouble to say that; it is too clear.’” See *Consol Ltd T/A Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another* 2005 6 SA 1 (SCA) at par 50 – 51; *Botha v Coopers & Lybrand* 2002 5 SA 347 (SCA) at 359; *Wilkins NO v Voges* 1994 3 SA 130 (A) at

ever be necessary to give “business efficacy” to a commercial agreement.<sup>346</sup> In respect of implied terms the general impact of establishing such a term on all contracts, or all contracts of a certain type,<sup>347</sup> mitigates against any quick ruling in favour of such terms. This latter category of terms does, however, provide some potential scrutiny of motive in contractual disputes in contrast to cases such as *Mustapha and Another v Receiver, Lichtenburgh and Others*.<sup>348</sup> In the light of the horizontal application of the Constitution, Schreiner JA’s remarks regarding private parties’ absolute freedom to act for “no reason or the worst of reasons”<sup>349</sup> cannot be sustained. Implied terms provide a private law route whereby fundamental rights, such as equality and dignity,<sup>350</sup> can be introduced into all contracts.<sup>351</sup> Such terms may not only be “considered to be good law in general,”<sup>352</sup> but indeed a constitutional imperative. Along this route motive can indeed be regulated to the extent that the motive in a particular case contradicts a particular relevant fundamental right. The obvious example is the right to equality<sup>353</sup> and the discriminatory motive in *Mustapha and Another v Receiver, Lichtenburgh and Others*.<sup>354</sup> However, beyond a conflict with a specific fundamental right, it is difficult to see how state motives can be regulated more generally by means of implied terms. This difficulty is illustrated by the conclusion of the court in *South African Forestry Co Ltd v York Timbers Ltd*<sup>355</sup> that the term advanced there could not be implied because:

---

137; *Delfs v Kuehne & Nagel (Pty) Ltd* 1990 1 SA 822 (A) at 827; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) at 533.

<sup>346</sup> See *Wilkins NO v Voges* 1994 3 SA 130 (A) at 142.

<sup>347</sup> *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) at par 28.

<sup>348</sup> 1958 3 SA 343 (A).

<sup>349</sup> *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 347.

<sup>350</sup> Sections 9 and 10 of the Constitution.

<sup>351</sup> Whether such an approach is the ideal option for infusing constitutional principles into contractual relationships is a different question and one I do not wish to address here.

<sup>352</sup> *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) at par 28.

<sup>353</sup> Section 9 of the Constitution.

<sup>354</sup> 1958 3 SA 343 (A).

<sup>355</sup> 2005 3 SA 323 (SCA) at par 30.

The acceptance of the new implied term contended for ... will mean that it becomes a term of every contract that the parties must not only perform their obligations in compliance with the provisions of the contract, but that they must do so in accordance with the dictates of fairness and good faith. This is in conflict with the established principles of our law.

An argument that a term should be implied in state contracts limiting state motives to the general public interest or that contractual powers “will not be exercised for invalid reasons”<sup>356</sup> would probably meet the same fate as the terms advanced in *South African Forestry Co Ltd v York Timbers Ltd*.<sup>357</sup> Even if such a term could be defined more precisely it would certainly appear too close to a general and direct reliance on reasonableness and fairness for South African courts’ current taste.

### 2.5.3 Limited capacity and illegality as ways of controlling motive

The state’s capacity may be limited with reference to motive, as noted above. This is effectively illustrated by the judgement in *East London Municipality v Legate*.<sup>358</sup> In that case the council sold land to the respondent for a nominal price of £3 on the condition that the respondent will develop a hotel on the property within a specified period.<sup>359</sup> Following the respondent’s failure to comply with this condition, the council sought to enforce a liquidated damages clause in the contract against the respondent.<sup>360</sup> The court rejected the claim, ruling that the contract was *ultra vires* the council and hence void.<sup>361</sup> It found that the council could only sell the land towards “the raising of funds for some municipal purpose.”<sup>362</sup> In contrast it was clear that the council’s purpose in

---

<sup>356</sup> *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 359.

<sup>357</sup> 2005 3 SA 323 (SCA).

<sup>358</sup> 1915 AD 313.

<sup>359</sup> *East London Municipality v Legate* 1915 AD 313 at 319, 321.

<sup>360</sup> *East London Municipality v Legate* 1915 AD 313 at 317, 321.

<sup>361</sup> *East London Municipality v Legate* 1915 AD 313 at 319, 321.

<sup>362</sup> *East London Municipality v Legate* 1915 AD 313 at 321.

entering into the sale was to secure the development of a hotel.<sup>363</sup> Since the development of a hotel could not be said to be a municipal purpose, the council acted beyond its powers.<sup>364</sup> This example illustrates that private law is not completely unmindful of the state's motives in entering into transactions. It clearly recognises the impact of motive on capacity, which subsequently has a direct effect on the private law enforcement of the contract. However, as argued in paragraph 2.4 above, this approach creates more concerns than it solves. It could thus hardly be viewed as an effective way of regulating motive itself.

The doctrine of illegality in contract law could arguably also control the state's motive. In terms of this doctrine courts will not enforce contracts that are contrary to public policy.<sup>365</sup> In extreme cases an offensive motive may render the enforcement of the contract contrary to public policy.<sup>366</sup> However, motive in this narrow sense will not often arise in the context of state commercial activity.

---

<sup>363</sup> *East London Municipality v Legate* 1915 AD 313 at 318.

<sup>364</sup> *East London Municipality v Legate* 1915 AD 313 at 318, 321.

<sup>365</sup> See par 2.2.2 above for a discussion of this doctrine in the context of state contracting.

<sup>366</sup> *De Beer v Keyser* 2002 1 SA 827 (SCA) at par 22; Van der Merwe *et al Contract: General Principles* 181; De Wet & Van Wyk *Kontraktereg & Handelsreg* 90.

### 3 Exclusively private law regulation and state efficiency and effectiveness

Arguments for increased efficiency and effectiveness<sup>367</sup> in public administration have been key driving forces in the continuing privatisation and outsourcing of state functions over the last decade or two.<sup>368</sup> Underlying these arguments is the contention that private market ordering is capable of

---

<sup>367</sup> Harlow & Rawlings *Law and Administration* 132 describe the meaning of the “functional values” of efficiency and effectiveness in the following terms: “Efficiency can refer to productive efficiency, simply, the relation between input and output; production is efficient when an article is manufactured at the cheapest cost. Allocative efficiency, on the other hand, refers to the relationship between producer and consumer; in this sense production of an article made cheaply is inefficient if consumers are unwilling to buy it ... Economy and efficiency together cover the idea of productive efficiency while effectiveness can be equated with allocative efficiency. Taken together, the three concepts add up to value for money.” Ehlers *Verwaltung in Privatrechtsform* 269 describes the distinction between efficiency and effectiveness helpfully as follows: “Unter Effektivität der Verwaltung ist hier das Verhältnis von Ziel und Ertrag (also die Ziel-Output-Relation), unter Effizienz das Verhältnis von Aufwand und Ertrag (also die Input-Output-Relation) zu verstehen” (footnote omitted) (Here, effectiveness of the administration is to be understood as the relationship between goal and outcome (the goal-output relationship) and efficiency is meant as the relationship between cost and outcome (the input-output relationship (my translation))). I also use the terms efficiency and effectiveness to convey the central meaning of value for money and nothing much will turn on the difference between the two terms. I also take these terms to include functional criteria such as time, diligence and comprehensiveness in response to consumer needs.

<sup>368</sup> Khoza & Adam *The Power of Governance* 16, 125; Wade & Forsyth *Administrative Law* 49 – 50; Seddon *Government Contracts* 34; Collins in Parker *et al* (eds) *Regulating Law* 28; Storr *Der Staat als Unternehmer* 7, 52 – 55; Davies *Accountability* 25; Harlow & Rawlings *Law and Administration* 133, 207; Freedland 1998 *Public Law* 288 at 298 – 299, 304, 1994 *Public Law* 86 at 86 – 87; Ehlers (1990) 45 *JZ* 1089 at 1099; Posner *Economic Analysis of Law* 380; Aronson in Taggart (ed) *The Province of Administrative Law* 42: “[T]he reasons [for privatisation and outsourcing] have included a blind ideological belief that governments can never provide goods and services as well as the private market” (footnotes omitted). I do not wish to enter into the debate whether privatisation and outsourcing increase efficiency in public administration. That is a question which justifies a dissertation on its own. I am here interested in a much narrower question, viz whether increased efficiency provides a compelling reason for the private law regulation of state commercial activity in contrast to public law regulation of such activity.



producing greater efficiency than the traditional command and control approaches of the state.<sup>369</sup> Following on from this contention is the argument that the legal tools of the private market, in particular contract, but also private law organisational forms, such as companies, are much better positioned to achieve optimal efficiency, value for money, in the pursuit of public goals than more onerous public law regulation is.<sup>370</sup> Collins submits that “the success of markets in performing the task of efficient satisfaction of consumer wants is no doubt the major justification for the contractualization of social relations.”<sup>371</sup> In this section I assess the argument that exclusively private law regulation of state commercial activity promotes efficiency and effectiveness in state administration.

### 3.1 Relevance of efficiency

Before investigating the claim that private law regulation enhances efficiency it is important to consider why efficiency and effectiveness are relevant considerations in relation to state activity.

---

<sup>369</sup> Khoza & Adam *The Power of Governance* 23, 25 (arguing that governments’ focus on control can seriously threaten the commercial success of state-owned enterprises and that it is not the government ownership of a business that impedes efficiency and effectiveness, but inadequate controls), 128 – 129; Posner *Economic Analysis of Law* 380: “[S]tate-owned business enterprises are likely to be much less efficient than private profit-making firms because the former are controlled by bureaucrats who lack the normal profit-maximizing incentives and constraints...”; Wade & Forsyth *Administrative Law* 49; Seddon *Government Contracts* 34; Collins in Parker *et al* (eds) *Regulating Law* 28, 31; Harlow & Rawlings *Law and Administration* 139 – 140; Freedland 1998 *Public Law* 288 at 298 – 299, 1994 *Public Law* 86 at 86 – 87; Baxter *Administrative Law* 65 – 66.

<sup>370</sup> Khoza & Adam *The Power of Governance* 128 – 129, 132 – 141 (arguing that a company form is likely to yield the most efficient and effective approach to state commercial activity); Seddon *Government Contracts* 34; Wade & Forsyth *Administrative Law* 49; Freedland 1998 *Public Law* 288 at 298 – 299; Harlow & Rawlings *Law and Administration* 139 – 140.

<sup>371</sup> Collins *Regulating Contracts* 18; Collins in Parker *et al* (eds) *Regulating Law* 28. Kirchner in Hoffmann-Riem & Schmidt-Aßmann (eds) *Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen* 67 puts this quality of private law regulation well when he states: “Privatrechtliche Regulierung scheint demnach janusköfig ausgerichtet zu sein an Fairness und Effizienz” (Private law regulation seems directed at fairness and efficiency in a Janus-faced manner (my translation)).

As a general statement it can hardly be doubted that optimal utilisation of public resources is an important objective in any state. In South Africa in particular this goal is even more pressing. The state faces enormous challenges in combating severe poverty that holds major sections of the population in its grip.<sup>372</sup> Socio-economic needs still far exceed delivery.<sup>373</sup> The list of needs seems endless. Added to the poverty pressures is a dire need for the state to aggressively confront the HIV/Aids epidemic that threatens the core of South African society.<sup>374</sup> On the income side of the balance sheet there are limits on the available resources and the state's ability to generate funds. Much needed economic growth and already high unemployment levels<sup>375</sup> restrict any significant increases in taxes. Although international funding remains significant, other, ostensibly greater, humanitarian crises dominate the global demand for resource assistance.<sup>376</sup> It is not difficult to "do the math" with these factors and realise that it is imperative for the South African state to stretch its rands as far as possible.

---

<sup>372</sup> In 1998 approximately 68% of South Africans lived below the poverty datum line: *National Report on Social Development 1995 – 2000*. An estimated 68.7% of all South African households had a monthly household income of below R1500 in 1995: Department of Housing *White Paper on A New Housing Policy and Strategy for South Africa* par 3.1.2. Unemployment stood at 25.6% in March 2006: Stats SA *Labour Force Survey*.

<sup>373</sup> The number of households living in squatter housing is estimated to increase with 150 000 per annum and in 1995 the urban housing backlog was estimated at 1.5 million units: *White Paper on A New Housing Policy and Strategy for South Africa* par 3.1.3, 3.2.1. By 2006 that backlog was still growing: Department of Housing *Annual Report 2005-2006* 26. In 2005 about 31.6% of households did not have access to running water; 10.2% of households had no access to any type of sanitation system and 33.5% of households were dependent on wood or paraffin for cooking: Stats SA *General Household Survey 2005* vi, xxvi. Only 21.9% of South Africans aged 20 and above had completed secondary education by 2005: Stats SA *General Household Survey 2005* iv.

<sup>374</sup> It is estimated that 5.5 million people live with HIV/Aids in South Africa and that 320 000 people in South Africa died of the epidemic in 2005: UNAIDS *2006 Report on the Global AIDS Epidemic* 455.

<sup>375</sup> Unemployment was estimated at 25.6% in March 2006: Stats SA *Labour Force Survey* (2006).

<sup>376</sup> High on this list are humanitarian crises such as that in the Darfur; the general drought in East Africa and severe devastation left behind by the 2005 earthquake in Pakistan.

This realisation is already having a notable impact on legal development as is evident from a number of recent judgements. As noted above,<sup>377</sup> the need to protect public resources was a significant policy consideration in the courts' limitation of delictual liability of the state in the tender context.<sup>378</sup> Ackermann J captured this realisation well when he said in *Fose v Minister of Safety and Security*:<sup>379</sup>

In a country where there is a great demand generally on scarce resources, where the government has various constitutionally prescribed commitments which have substantial economic implications and where there are 'multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform', it seems to me to be inappropriate to use these scarce resources to pay punitive constitutional damages to plaintiffs who are already fully compensated for the injuries done to them.

Apart from the factual realisation that the South African administration is bound to pursue efficiency, the Constitution also expressly recognises efficiency and effectiveness as important goals. Section 33(3)(c) expressly requires the legislation giving effect to the administrative justice rights to "promote an efficient administration." PAJA consequently states the promotion of an efficient administration as one of its objectives and allows for the variation of or a departure from a number of its core requirements if it is

---

<sup>377</sup> See par 2.3.2 above.

<sup>378</sup> See *Olitzki Property Holdings v State Tender Board and Another* 2001 3 SA 1247 (SCA) at par 30, 41: "[T]he grave impact on the exchequer raises a critical policy consideration"; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) at par 33, 40: "The chilling effect of the imposition of delictual liability on tender boards in a young democracy with limited resources, human and financial, on balance, is real"; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 47, 55: "The resources of our state treasury, seen against the backdrop of vast public needs, are indeed meagre". See also *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 2 SA 359 (CC) at par 80: "[T]he use of private law remedies to claim damages to vindicate public law rights may place heavy financial burdens on the State."

<sup>379</sup> 1997 3 SA 786 (CC) at par 72 (footnotes omitted).

required to promote efficiency.<sup>380</sup> Section 195(1)(b) of the Constitution lists as a principle governing public administration: “Efficient, economic and effective use of resources.” Finally, section 217(1) of the Constitution requires organs of state to procure goods and services in terms of a system that is cost-effective.

### 3.2 Factors generating efficiency

The claim that private law can achieve optimal levels of efficiency is a central tenet of the law and economics school of thought flowing from the work of Richard Posner.<sup>381</sup> Although this approach utilises complicated economic theories to analyse legal doctrine, a basic notion is that by allowing parties the freedom to construct their own relationship an efficient net result will be achieved since both parties will tend to act in rational self-interest to maximise their own wealth.<sup>382</sup> In a free market goods will thus find its way to its most

---

<sup>380</sup> See PAJA Preamble and s 2(1)(b), s 3(4)(b)(v), s 4(4)(b)(v), s 5(4)(b)(vi), s 5(6)(a).

<sup>381</sup> Posner *Economic Analysis of Law* 25: “The theory is that the common law is best (not perfectly) explained as a system for maximizing the wealth of society. Statutory or constitutional as distinct from common law fields are less likely to promote efficiency...”, 31 describing a “principal theme” of part of his book as “the congruence between the doctrines of the common law and the principle of economic efficiency”, 249: “[Common law] doctrines form a system for inducing people to behave efficiently...”; Posner (1975) 53 *Texas LR* 757 at 760; Kronman & Posner *The Economics of Contract Law* 5 *et seq*; Miceli *The Economic Approach to Law* 2; Kirchner in Hoffmann-Riem & Schmidt-Aßmann (eds) *Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen* 72 – 73; Collins *The Law of Contract* 25.

<sup>382</sup> Posner (1975) 53 *Texas LR* 757 at 761 *et seq*; Posner *Economic Analysis of Law* 9 *et seq*; Kronman & Posner *The Economics of Contract Law* 1 – 2; Miceli *The Economic Approach to Law* 7 – 8, 111; Collins *The Law of Contract* 25 – 26; Parisi in Posner & Parisi (ed) *The Economic Structure of the Law* xii *et seq*. Minda *Postmodern Legal Movements* 99 captures this basic approach of the original (Chicago School) law and economics scholars when he states: “Their underlying legal perspective is the product of a worldview that pursues truth about law within a paradigm that evaluates legal rules under the single universal standard of wealth maximization. For these practitioners, the law and efficiency hypothesis became a comprehensive organizational principle for understanding the nature of legal relations.” In his analysis of the subsequent development of law and economics scholarship, Minda *Postmodern Legal Movements* 100 concludes that “all law and economics scholars [commits]

valuable use.<sup>383</sup> Exhibiting the same drive to increase wealth, parties will also allocate risk to that party that can minimise or cover the risk at the lowest cost.<sup>384</sup> As a result an optimal allocation of resources at lowest cost to society will be achieved, that is an efficient result.<sup>385</sup> The role of (contract) law in this analysis is to create the framework in terms of which parties can construct their relationship. It should thus reduce the cost of behaviour aimed at realising the exchange and increase the cost of behaviour aimed at undermining the exchange.<sup>386</sup> Private (common) law, it is argued, could achieve this advantageous balance of freedom and constraint.<sup>387</sup>

Although there are many more relevant factors in an economic analysis of (contract) law and its conclusion that such system can and does achieve optimal efficiency levels, it will suffice for present purposes to note the basic notions of market participants as freely acting in rational self-interest linked to a profit-seeking objective. Irrespective of whether one finds the economic analysis of law convincing or not<sup>388</sup> these basic notions seem hardly

---

to the view that rational, self-interested calculation of individual cost and benefit is the best key for understanding and evaluating the nature of legal relations and various rule systems.”

<sup>383</sup> Kronman & Posner *The Economics of Contract Law* 2; Posner *Economic Analysis of Law* 9 *et seq*; Miceli *The Economic Approach to Law* 7 – 8, 110; Parisi in Posner & Parisi (ed) *The Economic Structure of the Law* xii.

<sup>384</sup> Kronman & Posner *The Economics of Contract Law* 36; Posner *Economic Analysis of Law* 98, 250; Miceli *The Economic Approach to Law* 139 – 141; Collins *Regulating Contracts* 47.

<sup>385</sup> Kronman & Posner *The Economics of Contract Law* 2; Posner *Economic Analysis of Law* 25; Miceli *The Economic Approach to Law* 4 – 7.

<sup>386</sup> Kronman & Posner *The Economics of Contract Law* 4.

<sup>387</sup> Kronman & Posner *The Economics of Contract Law* 4 – 5. Posner (1975) 53 *Texas LR* 757 at 765 notes: “In fact what one observes is areas of the law that seem to have a powerful and consistent economic logic – for example, most common law fields – and others that seem quite perverse from an economic standpoint – in particular, many statutory fields.”

<sup>388</sup> I do not wish to express any view on the merits of the law and economics school of thought. My reference to it here is only because of the fact that the general notion of efficiency plays such a central role in the economic analysis of law and has accordingly been studied and developed as a concept in law and economics writings to a much higher degree than in any other jurisprudential tradition. In any case, much of the criticism that follow is of a normative nature aimed at efficiency itself. Since, as Posner (1975) 53 *Texas LR* 757 at 776 notes “[t]he law and economics scholars have been scrupulous ... in respecting the line

disputable as accurate observations of commercial realities. As such they are key ingredients in the efficiency characteristic of private markets pursued by modern public administration. But precisely on this point lies a major weakness in the efficiency argument in favour of private law regulation of state commercial activity. The problem is twofold. Firstly, there is the absence of profit-seeking on the part of the state.<sup>389</sup> Related to this is the (near) absence of financial market pressures on the state.<sup>390</sup> In the absence of these driving forces it is difficult to see how private law can achieve similar efficiency results in relation to state activity than it does in the private sphere. I return below to the argument that there are different values than profit-seeking, or wealth accumulation, underlying state commercial activity and the effect this has on the efficiency argument. For present purposes it is sufficient to note that when the profit-seeking objective is removed from the picture, the value for money *analysis* at least must fundamentally change. For example, when the state contracts for the delivery of services to the public the failure of the counterparty to deliver those services in an adequate manner to the public cannot readily be quantified as a loss on the part of the state.<sup>391</sup> Accordingly it becomes difficult to formulate appropriate cost sanctions that will deter the

---

between positive and normative analysis,” keeping to the former and that “[i]f a social institution is inefficient, someone to whom efficiency is an important value may want to change it. But the economist cannot, and the good economist does not, tell him that he *should* adopt efficiency as an important or paramount value,” my criticism of adopting efficiency as an all-important measure is not aimed at the law and economics school of thought, at least not in its positive analysis. See also Posner (1979) 8 *Journal of Legal Studies* 103. Furthermore, as Minda *Postmodern Legal Movements* 95 notes: “[M]ost practitioners [of law and economic scholarship] now reject the notion that efficiency should be regarded as the only legal norm in common law adjudication.”

<sup>389</sup> See Ehlers (1990) 45 *JZ* 1089 at 1091 for the argument that the *Rechtsstaatprinzip* requires all state action to be motivated by public goals, which consequently excludes a pure profit-seeking objective on the part of the state. See also Ehlers in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 21, 155; Davies *Accountability* 205. On the difference between profit and cost-effectiveness (or value for money) as an important principle in public procurement, see note 152 above.

<sup>390</sup> See par 2.2.4.1 above for a discussion of the absence in relation to the state of financial market pressures typically experienced by private market participants.

<sup>391</sup> See Seddon *Government Contracts* 35.

private party from reneging. In such a situation it is extremely problematical to evaluate the parties' relationship in terms of a cost-benefit analysis. Secondly, there is significantly less freedom in state commercial activity than in analogous private conduct. It has been argued in a number of places above<sup>392</sup> that not only is the state significantly constrained in its freedom of action, that is in the choices it can legitimately make, but also because of the state's inherent superior power, the private counterparty has much less freedom when transacting with the state. It seems that the efficiency objective is simply a mismatch in assessing any regime regulating state activity.

However, a claim that increased efficiency due to private law ordering is only based on free choice and profit-seeking in the present context is perhaps an overstatement. Efficiency in public administration is certainly also served by what is absent or excluded in private law regulation. The point here is simply that private law amounts to a "lighter" form of regulation than public law. The absence of these more onerous public law regulatory tools must by implication enhance efficiency. The absence of intensive regulation at least creates the scope for increased efficiency.<sup>393</sup> For example, since the state will be able to act under less procedural requirements, transaction costs will be significantly reduced, which enhances efficiency.<sup>394</sup> Private law ordering also allows more substantive scope in state transacting since a direct reliance on restrictive conditions such as reasonableness is excluded. If a strict proportionality test were to be applied to state commercial activity, hard

---

<sup>392</sup> See par 2.2 and par 2.4 as well as chapter three at par 3.3 above.

<sup>393</sup> Teubner in Teubner (ed) *Dilemmas of Law in the Welfare State* 306 notes that in the regulatory crisis experienced in the modern welfare state: "State interventionist law is supposed to be one of the main obstacles to reaching the goal of allocative efficiency." But cf Ehlers *Verwaltung in Privatrechtsform* 217 – 220 for a rejection of similar arguments in German law in relation to the *Grundrechtsbindung* of the administration acting in private law form.

<sup>394</sup> Wade & Forsyth *Administrative Law* 440: "It is true that the rules of natural justice restricts freedom of administrative action and that their observance costs a certain amount of time and money"; Stiglitz in Hardiman & Mulreany (eds) *Efficiency & Effectiveness in the Public Domain* 43: "[P]rocedures ... make it more difficult for public institutions to respond quickly to changing circumstances, and to adapt well to special needs and interests. They interfere with economic efficiency."

bargaining by the state will surely not be possible, while private law seems perfectly comfortable with such conduct.<sup>395</sup> If the state is subjected to higher levels of (restrictive) regulation than private market participants the state will simply be priced out of the market.<sup>396</sup> Although there are certainly many factors to be considered in response to this claim, the simple truth of it must be acknowledged.

### 3.3 Competing values

As noted in the previous paragraph, an important consideration in evaluating the efficiency and effectiveness claims in the present context is the role of competing values. There is more than one way in which this question can be asked. One approach is to ask what efficiency and effectiveness with regard to state activity entail. Can it simply refer to a strict value for money assessment, meaning the best use of resources, or must other values also inform the determination of efficiency and effectiveness? Along these lines one can argue that factors such as responsiveness to citizens' needs, public participation,<sup>397</sup> transparency<sup>398</sup> and maintaining professional ethics<sup>399</sup> should

---

<sup>395</sup> *Medscheme Holdings (Pty) Ltd and Another v Bhamjee* 2005 5 SA 339 (SCA) at 346: "[I]t is not unlawful, in general, to cause economic harm, or even to cause economic ruin, to another, nor can it generally be unconscionable to do so in a competitive economy. In commercial bargaining the exercise of free will ... is always fettered to some degree by the expectation of gain or the fear of loss ... hard bargaining is not the equivalent of duress, and that is so even where the bargain is the product of an imbalance in bargaining power. Something more ... would need to exist for economic bargaining to be illegitimate or unconscionable and thus to constitute duress."

<sup>396</sup> Khoza & Adam *The Power of Governance* 95; Davies (2006) 122 LQR 98 at 99, 114 notes the potential increased price implications of applying strict public law regulation to state contracting; Aronson in Taggart (ed) *The Province of Administrative Law* 59 notes that "the level playing field is a powerful rhetorical device" in shielding government business activities from onerous public law regulation such as freedom of information regimes.

<sup>397</sup> Constitution s 195(1)(e).

<sup>398</sup> Constitution s 195(1)(g).

<sup>399</sup> Constitution s 195(1)(a).



stand alongside optimal resource utilisation as the benefits to be offset against costs in the efficiency and effectiveness calculation.<sup>400</sup>

Another way to put the same question is to ask what importance one should attach to efficiency, measured in a narrow value for money sense, as opposed to other values, such as those highlighted above. This approach is not only critical of the merit of efficiency as an important question in regulating state conduct, but also has adverse implications for contract as a mechanism to achieve state efficiency. Collins captures this realisation as follows:

Contracts also establish social relations with a currency of exchange which is quantifiable and measurable. This currency permits the introduction of what Max Weber called formal rational economic behaviour into any type of social relation contained in a contract. The question asked about the relation is whether it increases the wealth of the parties or whether it satisfies their preferences. Other questions about the contribution of the relation to the meaning of the lives of the parties are rendered irrelevant, because they cannot be incorporated into the contractual measurement of success.<sup>401</sup>

---

<sup>400</sup> See Currie & Klaaren *The Promotion of Administrative Justice Benchbook* 31; Wade & Forsyth *Administrative Law* 440 argue that “it is because they are essentially rules for upholding fairness and so reducing grievances that the rules of natural justice can be said to promote efficiency rather than impede it”; Posner *Economic Analysis of Law* 264: “But are morality and efficiency really inconsistent? The economic value of such moral principles as honesty, truthfulness, frugality, trustworthiness (as by keeping promises), consideration for others, charity, neighborliness, hard work, and avoidance of negligence and of coercion will be apparent to the careful reader of the previous chapters. Honesty, trustworthiness, and love reduce the costs of transactions. Forswearing coercion promotes the voluntary exchange of goods. Neighborliness and other forms of selflessness reduce external costs and increase external benefits ... Charity reduces the demand for costly public welfare programs. Care reduces social waste” (footnotes omitted).

<sup>401</sup> Collins *Regulating Contracts* 22 (footnotes omitted). Naudé & Lubbe (2005) 122 *SALJ* 441 at 460 make a similar point in relation to the treatment of the exemption clause in *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA), stating: “That the business interests of the hospital were accorded more weight than the patient’s non-commercial interests is shown by the remark that exemption clauses have become the norm rather than the exception in standard-form contracts and that, ‘wat die perke van sulke klousules betref, word dit blykbaar

In the context of state conduct these “other questions” are of vital importance. The Constitution does not only place these competing values on the agenda alongside efficiency,<sup>402</sup> but indeed obliges the state to pursue a large number of socio-economic and democracy-building objectives.<sup>403</sup> If one accepts Collins’ argument that a contractual paradigm excludes these “other questions” from the assessment in favour of efficiency, one has to ask whether contract can ever be a suitable mechanism for state conduct, let alone contract law an appropriate system to regulate state activity.<sup>404</sup> However, it is unrealistic to exclude contract and hence contract law completely from all state activity. In fact the Constitution itself does not demand such a course of action since it expressly recognises organs of state’s powers to contract in section 271(1).<sup>405</sup> Collins argues that a viable

---

grotendeels bepaal deur wat *besigheidsoorwegings*, soos die opweging van besparing aan versekeringspremies, mededingendheid en die moontlike afskrikking van potensiële kliënte’ (sic)” (footnotes omitted, emphasis by the authors) (the limits of such clauses are ostensibly largely determined by commercial considerations such as the weighing up of savings in insurance premiums, competitiveness and the possibility of putting off potential clients (my translation)).

<sup>402</sup> Eg in s 195(1) of the Constitution.

<sup>403</sup> See eg the Preamble of the Constitution.

<sup>404</sup> See Harlow & Rawlings *Law and Administration* 133 noting with reference to the functional values of economy, efficiency and effectiveness: “Critics have argued that the criteria undercut the very concept of public service.” They evocatively illustrate the inadequacy of bare efficiency arguments with the following example: “Short-term economies may bring long-term inefficiencies, as when patients are discharged to free up hospital beds into an inadequate care situation which results in further and more serious illness. Or should we argue that death would be more cost-efficient?”; Singer *Entitlement* 129 argues that “it seems either perverse or obtuse to reduce all relevant considerations in a case to numerical or monetary amounts”; Freedland 1994 *Public Law* 86 at 103 remarks in this regard: “Above all, considerations of public policy and public interest tend to be marginalised by commercial and competitive considerations”; Mulreany in Hardiman & Mulreany (eds) *Efficiency and Effectiveness in the Public Domain* 30 – 31. See also Black in Parker *et al* (eds) *Regulating Law* 38 for the argument that there are other uses of law than an instrumental one, such as the symbolism of the moral content of law, which are not susceptible to effectiveness evaluation.

<sup>405</sup> Whether this section can be read as *granting* the power to contract to organs of state as the majority suggested in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3

solution to this dilemma is to “confine the operations of markets in social life.”<sup>406</sup> The same reasoning can be applied in the current context. The importance of competing values to efficiency should motivate us to refrain from applying a market based approach to state conduct. This does not only mean that market related standards such as efficiency are probably not suitable in evaluating different regulatory regimes for state conduct, but also that treating state conduct, irrespective of its commercial nature, as simply market based activity is constitutionally suspect.<sup>407</sup>

### 3.4 Overburdening the state

The argument for increased efficiency and effectiveness in public administration does not work exclusively in favour of private law regulation of state commercial activity, but may also work against such regulation. The strict application of contract law analysis to state conduct may lead to the overburdening of the state and hence hamper efficient and effective government. Simply put the problem is that the application of contract law to state conduct inevitably results in the relationship between the state and citizens flowing from such conduct being regarded as contractual in nature. This would bind the hands of the state where it would want, or need, more freedom of action.<sup>408</sup> Barring application of public law escape routes, such as

---

SA 121 (CC) at par 20, 33 is open to doubt. In my view the section simply limits a power to contract by imposing specific constitutional conditions on such power. See chapter two at par 3.1.2.3.2 above.

<sup>406</sup> Collins *Regulating Contracts* 23.

<sup>407</sup> Singer *Entitlement* 124 – 125 argues: “[B]y suggesting that we measure costs and benefits by market values, [efficiency analysis] assumes that market prices are accurate proxies for social utility or welfare ... Efficiency analysis does not prevent us from counting losses of trust and neighborliness as costs ... The point, however, is that market measures draw our attention away from such costs because there is no market for social norms and no market for trust. Efficiency analysis puts these costs on the periphery; it makes them less salient than they would be if we considered the effects of legal rules in a language that focused on some other measure than fair market value or expected prices.”

<sup>408</sup> Autexier (1993) 52 *VVDStRL* 285 at 293 (discussing the recognition of this problem in French law).

the no-fettering principle,<sup>409</sup> the state will consequently have to pay damages to the private counterparty in order to depart from its previous conduct. In this scenario a contract law analysis imposes an additional financial burden on the state in the exercise of its public mandate. The contract law analysis thus renders the state action less efficient. It also has effectiveness implications where the state, for example, does not wish to act contrary to its previous course of action, but does need to adjust specific actions. The contract law analysis will generally not allow the state to unilaterally alter its conduct, but will require it to negotiate with the private counterparty to effect an amendment to the relationship. Apart from the fact that this may prove a cumbersome way for the state to change course, especially if such change had an impact on a large number of citizens and hence “contracts”, it may also expose the state to hold-up situations by uncooperative counterparties. Davies furthermore notes the adverse symbolic effect of an analysis of the state’s actions in departing from previous undertakings as a breach of

---

<sup>409</sup> The no-fettering principle of public law (at times also called the principle of government effectiveness or executive necessity) in essence entails that the state cannot bind its future discretion. The state cannot therefore validly enter into a contract that binds it to a future course of action where it is required to exercise its discretion at the time of acting. The rationale behind this principle is ostensibly that since the state is obliged to exercise its discretion in the best interest of the public at the time of acting, it cannot divest itself of such discretion by entering into binding agreements relating to such future conduct. Both the content and scope of application of the principle is, however, far from clear. The leading (English) case on this principle is *Rederiaktiebolaget Amphitrite v The King* [1921] 3 KB 500 where Rowlatt J held at 503 that it is “not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises.” The principle was endorsed in *Sachs v Dönges* NO 1950 2 SA 265 (A) and *Fellner v Minister of the Interior* 1954 4 SA 523 (A). Davies (2006) 122 LQR 98; Wade & Forsyth *Administrative Law* 330 – 334, 840 – 841; De Ville *Judicial Review of Administrative Action in South Africa* 116 – 120; Hoexter *Administrative Law in South Africa* 285 – 291; Turpin *Government Procurement and Contracts* 85 – 90; Baxter *Administrative Law* 419 – 424; Bolton *The Law of Government Procurement in South Africa* 86 – 95; Arrowsmith *Civil Liability and Public Authorities* 72 – 78; Mitchell *The Contracts of Public Authorities* 6 et seq.

contract.<sup>410</sup> Especially where such “breach” is rendered necessary by public interest considerations, it seems inappropriate to view it as legally objectionable conduct.

In the context of French administrative law it has been argued that the contract law analysis of state conduct should not be stretched too far for a fear of impeding effective public administration.<sup>411</sup> The specific concern is that a too rigorous contract law analysis will deter public bodies from entering into discussions with members of the public prior to acting for fear that the resultant conduct will be categorised as contractual in nature, with the adverse binding (and potentially damages) effects discussed above.<sup>412</sup> In South Africa, where public participation in state administration is a constitutional imperative,<sup>413</sup> this concern is indeed a significant one.

The concern about overburdening the state is not restricted to the application of contract law to state activity, but can be extended to the application of private law more generally. This is illustrated by the judgement in *Kempton Park/Tembisa Metropolitan Substructure v Kelder*.<sup>414</sup> In that case a ratepayer of a local council approached the court for an order “to force the council to cut off the supply of electricity to persons who failed to pay the charges therefor and to maintain such discontinuation until all outstanding debts and fines had in such cases been paid by the defaulters.”<sup>415</sup> The

---

<sup>410</sup> Davies (2006) 122 *LQR* 98 at 105. See also her apt remark in a related context at 112: “But the legitimate exercise of public powers should not be treated as a matter for condemnation.”

<sup>411</sup> Jauffret-Spinosi in Harris & Tallon (eds) *Contract Law Today* 135 – 136; Autexier (1993) 52 *VVDStRL* 285 at 293.

<sup>412</sup> Jauffret-Spinosi in Harris & Tallon (eds) *Contract Law Today* 135. One way in which such a consequence has been avoided in French law is by identifying a true (one-sided) administrative action between the negotiations and the implementation of the specific measures. The result of such identification is that the subsequent measures are classified as of an authoritative public law nature flowing from the administrative action and not of a contractual nature based on the negotiations. See *Conseil d’Etat*, 23 October 1973, *Sieur Valet*; Autexier (1993) 52 *VVDStRL* 285 at 287.

<sup>413</sup> Constitution s 195(1).

<sup>414</sup> 2000 2 SA 980 (SCA).

<sup>415</sup> *Kempton Park/Tembisa Metropolitan Substructure v Kelder* 2000 2 SA 980 (SCA) at par 6.

applicant argued that such conduct was prescribed as the “normal credit control measures” contained in a business plan adopted by council resolution.<sup>416</sup> The application failed at first instance, but succeeded on appeal to a Full Bench of the High Court. In granting the order, the High Court argued that the council stood in a fiduciary relationship to ratepayers similar to that of a trustee towards beneficiaries of a trust.<sup>417</sup> Applying principles from the private law of trusts, the High Court found that the council was obliged to enforce the credit control measures against defaulting consumers.<sup>418</sup> In further appeal to the Supreme Court of Appeal, this reasoning was rejected.<sup>419</sup> The court ruled that an application of principles from the private law of trusts would impose too onerous duties on the council and would unduly bind it.<sup>420</sup> It found that the council had to be free to exercise its discretion in enforcing credit control and to respond to the specific context facing it.<sup>421</sup> It was furthermore only required to take “reasonable and practical steps.”<sup>422</sup> More than this, as the private law of trusts would require, was not justified.

---

<sup>416</sup> *Kempton Park/Tembisa Metropolitan Substructure v Kelder* 2000 2 SA 980 (SCA) at par 7, 13.

<sup>417</sup> *Kempton Park/Tembisa Metropolitan Substructure v Kelder* 2000 2 SA 980 (SCA) at par 14.

<sup>418</sup> *Kempton Park/Tembisa Metropolitan Substructure v Kelder* 2000 2 SA 980 (SCA) at par 14.

<sup>419</sup> *Kempton Park/Tembisa Metropolitan Substructure v Kelder* 2000 2 SA 980 (SCA) at par 15.

<sup>420</sup> *Kempton Park/Tembisa Metropolitan Substructure v Kelder* 2000 2 SA 980 (SCA) at par 15.

<sup>421</sup> *Kempton Park/Tembisa Metropolitan Substructure v Kelder* 2000 2 SA 980 (SCA) at par 16.

<sup>422</sup> *Kempton Park/Tembisa Metropolitan Substructure v Kelder* 2000 2 SA 980 (SCA) at par 16.

## 4 Private law as reflexive regulation

### 4.1 Reflexivity or responsiveness in regulation

An important advantage of contract law as regulation resides in its reflexive qualities. Reflexivity is used in systems theory to refer to the relationship between the regulation and the social practice it regulates.<sup>423</sup> Reflexive regulation, in essence, attempts to be sensitive to the expectations and realities of the particular parties to the regulated social practice.<sup>424</sup> The aim is to position the regulation vis-à-vis the communication system(s) in terms of which the parties perceive the social practice in such a way as to produce the desired regulatory outcomes without distorting, diminishing or corrupting the social practice within such communication system(s).<sup>425</sup> Reflexivity or responsiveness as a characteristic of a regulatory system can be contrasted to more traditional “command and control” forms of (legal) regulation.<sup>426</sup> Central to the former type of regulation is the participation of those regulated in creating, maintaining and enforcing the rules of the regulatory system.<sup>427</sup> Reflexive regulation therefore amounts largely to self-regulation within broad binding legal frameworks.<sup>428</sup>

### 4.2 Contract law as reflexive regulation

Contract law represents a reflexive system of regulation on a number of levels. The parties to a specific contractual relationship are largely<sup>429</sup> able to determine the content of the particular rules constituting the regulation of that

---

<sup>423</sup> Collins in Parker *et al* (eds) *Regulating Law* 24.

<sup>424</sup> Collins in Parker *et al* (eds) *Regulating Law* 24.

<sup>425</sup> Collins in Parker *et al* (eds) *Regulating Law* 24; Teubner in Teubner (ed) *Dilemmas of Law in the Welfare State* 311.

<sup>426</sup> Collins *Regulating Contracts* 65; Storr *Der Staat als Unternehmer* 55 – 56.

<sup>427</sup> Collins *Regulating Contracts* 65; Storr *Der Staat als Unternehmer* 56.

<sup>428</sup> Teubner in Teubner (ed) *Dilemmas of Law in the Welfare State* 302 describes it as a “strategic model of law” that denotes “a generalized form of legal control of social self-regulation.”

<sup>429</sup> Parties do not have complete freedom in setting the terms of their relationship, since contract law does prescribe some mandatory terms. However, these are generally limited and most terms implied into a contract by law can be excluded or varied by the parties.

relationship and conduct in terms of it. With its emphasis on freedom of contract, contract law thus facilitates this type of self-regulation. Another level at which contract law represents a reflexive system is in monitoring and enforcing compliance with the regulatory rules. Collins describes this dimension of contract law as “an extreme example of responsive or reflexive regulation.”<sup>430</sup> It is left to the parties to monitor the counterparty’s compliance with the terms of the regulatory system and, most importantly, to seek judicial intervention, that is legal sanctions, in instances of non-compliance. Enforcement in the regulatory system created by contract law is thus left to the discretion of the particular parties to the transaction.<sup>431</sup> Self-regulation in this respect is not restricted to the choice to enforce the regulatory rules, but extends to the manner of enforcement and largely the content of the legal sanctions invoked. At the one end of the spectrum, a party can seek an order for specific performance from a court to strictly enforce the rules of the agreed regulation, or, at the other end, can negotiate an amendment to the regulatory rules in the light of the counterparty’s non-compliance with the original rules.

These reflexive qualities of contract law as regulation are said to yield a number of advantages over other forms of less responsive regulation. The increased freedom in formulating, monitoring and enforcing the rules governing the parties’ conduct arguably enhances market competition, which accordingly brings about higher levels of efficiency.<sup>432</sup> Linked to increased efficiency is the advantage of a shift in focus from regulatory measures to regulatory results or outcomes.<sup>433</sup> The enhanced freedom also opens up the door to experimentation with alternative and new forms of structuring relationships.<sup>434</sup> This characteristic of contract law as reflexive regulation highlights one of its biggest advantages. That is its high level of sensitivity to the specific context being regulated. The parties’ participation in effecting the

---

<sup>430</sup> Collins *Regulating Contracts* 67.

<sup>431</sup> Collins *Regulating Contracts* 66 – 67.

<sup>432</sup> Storr *Der Staat als Unternehmer* 56. See also par 3 above for the argument that private law regulation enhances efficiency.

<sup>433</sup> Storr *Der Staat als Unternehmer* 56.

<sup>434</sup> Braithwaite & Parker in Parker *et al* (eds) *Regulating Law* 285; Collins *Regulating Contracts* 66 – 67; Storr *Der Staat als Unternehmer* 56.



regulation not only allows for tailor-made rules to be formulated at the outset, suited to the specific context, but also allows for suitable readjustment of the rules as circumstances change.<sup>435</sup> This advantage in turn generates a number of further advantages. The familiar over- and under-inclusiveness of rules are largely mitigated.<sup>436</sup> Unanticipated (and unpredictable) changes in circumstances (both from external factors and the regulation itself) pose a significantly lower regulatory risk since the parties can readily reposition within the system of regulation. This, in turn, may have considerable efficiency implications. The system's ability to easily accommodate changing circumstances, both within a particular transaction and generally over time, within the existing framework, renders it exceptionally stable and can accordingly achieve high levels of certainty. Finally, the participation of the parties to the particular transaction in setting up, monitoring and enforcing the regulatory rules enhances the level of expertise involved.<sup>437</sup> In this way the regulation is much more likely to be viable and not to place unrealistic burdens on those regulated than other forms of vertically imposed regulation. It accordingly represents one way to minimise the general problem of the courts' limitations in addressing polycentric decision-making such as those involved in state commercial activity.<sup>438</sup>

### **4.3 Reduced reflexivity in state commercial activity**

It is clear from the previous paragraph that contract law represents a superior regulatory system to many other forms of regulation, especially of the interventionist, command and control type, because of its high level of reflexivity. However, there are some elements of state commercial activity that undermine the reflexive quality of contract law as regulatory system.

The first impediment to reflexivity is generally found in standard-form contracts. The problem is that, since the contract is dictated by one of the parties to the transaction, the rules regulating the relationship between the

---

<sup>435</sup> Collins *Regulating Contracts* 66 – 67.

<sup>436</sup> Collins *Regulating Contracts* 66.

<sup>437</sup> Collins *Regulating Contracts* 66, 69.

<sup>438</sup> See par 5.3 below on this problem.

parties are likely to only reflect the expectations of that one party.<sup>439</sup> Collins refers to the outcome as achieving only “partial reflexivity.”<sup>440</sup> This dilemma can be extrapolated to a more general statement. Contract law will only constitute truly reflexive regulation when the parties to the transaction have equal bargaining power. Significant disparity in bargaining power may largely reduce the participation of *both* parties in constructing the rules regulating their relationship and inhibit the weaker party from effectively monitoring and enforcing regulatory compliance by the stronger party. Factors such as limited access to information, the inability to renegotiate terms and high litigation costs readily preclude economically weaker parties from effectively exercising their monitoring and enforcing roles within the system of contract law regulation. As I argued above,<sup>441</sup> state commercial activity is largely characterised by a disparity in bargaining power in favour of the state. It follows that contract law’s ability to achieve reflexivity in regulation is greatly diminished when applied to state commercial activity.

Collins notes another fundamental problem with contract law as reflexive regulation. He argues that where multiple communication systems simultaneously inform the social practices being regulated one such communication system inevitably will be prioritised above the other(s).<sup>442</sup> He continues that in contract law economic analysis is prioritised above other communication systems.<sup>443</sup> Contract law thus achieves reflexivity in the context of commercial transactions aimed at wealth maximisation by exchange of goods and services.<sup>444</sup> However, where there are different communication systems at work, contract law inhibits reflexive regulation since it generally restricts the parties’ ability to give effect to alternative communication systems in terms of their self-regulation.<sup>445</sup> In this regard Collins notes:

---

<sup>439</sup> Collins *Regulating Contracts* 67 – 68.

<sup>440</sup> Collins *Regulating Contracts* 68.

<sup>441</sup> See par 2.2 and chapter three at par 3.3 above.

<sup>442</sup> Collins in Parker *et al* (eds) *Regulating Law* 26.

<sup>443</sup> Collins in Parker *et al* (eds) *Regulating Law* 27.

<sup>444</sup> Collins in Parker *et al* (eds) *Regulating Law* 27.

<sup>445</sup> Collins in Parker *et al* (eds) *Regulating Law* 27.

Starting with the paradigm that contractual practices are dominated by discourses of economic interest, the general rules of contract law will always encounter difficulty in achieving an adequate level of reflexivity when they encounter contractual practices which give priority to other frameworks of communication.<sup>446</sup>

These arguments hold particular implications for the reflexivity of contract law regulation of state commercial activity. Although economic dialogue is certainly present in the context of state commercial activity,<sup>447</sup> such system of communication is neither the only relevant one nor the most important one. As I argued above in the context of the efficiency argument,<sup>448</sup> there are many competing values underlying state commercial activity. In the present context one can view many of those as different communication systems. Good public governance and transparency is one important such communication system.<sup>449</sup> Another is one of morals in which the state is expected to demonstrate only the highest degree of ethics.<sup>450</sup> A third framework of

---

<sup>446</sup> Collins in Parker *et al* (eds) *Regulating Law* 27 – 28.

<sup>447</sup> The constitutional principle of cost-effective public administration in fact requires such analysis, see the Constitution s 195(1)(b), 217(1).

<sup>448</sup> See par 3.3 above.

<sup>449</sup> See the Constitution s 195(1), s 217(1).

<sup>450</sup> See the Constitution s 195(1)(a). See also Langa J's remarks regarding the state as moral "role model" in *S v Makwanyane and Another* 1995 3 SA 391 (CC) at par 222: "Implicit in the provisions and tone of the Constitution are values of a more mature society, which relies on moral persuasion rather than force; on example rather than coercion. In this new context, then, the role of the State becomes clear. For good or for worse, the State is a role model for our society"; *Ex parte Minister of Safety and Security and Others: In re S v Walters and Another* 2002 4 SA 613 (CC) at par 6 and *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Other* 2006 2 All SA 175 (E) at par 82. See also the arguments presented by Seddon *Government Contracts* 12 – 13 in the Australian context on the government as "moral exemplar" as reason for placing higher standards on government commercial activities and Davies (2006) 122 *LQR* 98 at 105 on a similar argument in English law. Pakuscher argues that in German law the state is also subject to higher standards irrespective of whether it acts under private or public law because of its obligation to "pay respect to the basic rights of the Constitution." He submits that because of this reason "the administration cannot evade judicial control, even if the State uses means of private law":

communication relates to the important transformative goals inherent in all South African state commercial activity.<sup>451</sup> In the light of these multiple communication systems shaping state commercial activity and the priority of most of these over an economic framework in South Africa, the reflexivity of contract law as regulatory system will be greatly impaired along the lines argued by Collins above.<sup>452</sup>

## 5 Privity and standing in private law regulation

The final matter that deserves attention in relation to private law regulation of state commercial activity is that of privity and standing. The doctrine of privity of contract in private law states that a contract only binds the parties to that contract and generally does not have any legal significance for third parties.<sup>453</sup> The contract creates rights and obligations only for the contracting parties and only those parties have standing to enforce such rights and obligations in private law.<sup>454</sup> The application of this doctrine in the regulation of state commercial activity has potentially far-reaching consequences.

---

Pakuscher (1971) 20 *Journal of Public Law* 273 at 285. See also Ehlers in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 154 *et seq.*

<sup>451</sup> See par 2.3 above on the importance of these goals underlying all state activity in South Africa.

<sup>452</sup> This problem is directly related to the paradigm view of contract as a monolithic notion aimed at commercial exchange between essentially two autonomous parties, ie a practice dominated by economic objectives. If one can shift this paradigm view of contract to embrace a more plural view of contractual practices, it may be possible to enhance reflexivity of contract law in diverse contexts such as state commercial activity. See further note 484 below.

<sup>453</sup> Van der Merwe *et al Contract: General Principles* 4, 245 – 250; Furmston *Cheshire, Fifoot & Furmston's Law of Contract* 500 *et seq*; Lubbe & Murray *Farlam & Hathaway Contract* 15, 407; De Wet & Van Wyk *Kontraktereg & Handelsreg* 2 – 3; *Minister of Public Works and Land Affairs v Group Five Building Ltd* 1999 4 SA 12 (SCA) at 17. For discussions of the historical development of this doctrine in common law see Atiyah *The Rise and Fall of Freedom of Contract* 412 *et seq* and in civil law: Zimmermann *The Law of Obligations* 5 – 6, 34, 45.

<sup>454</sup> Van der Merwe *et al Contract: General Principles* 4, 245 – 250; Furmston *Cheshire, Fifoot & Furmston's Law of Contract* 500 *et seq*; Lubbe & Murray *Farlam & Hathaway Contract* 15, 407; De Wet & Van Wyk *Kontraktereg & Handelsreg* 2 – 3. To the extent that South African law recognises a contract for the benefit of a third party, a *stipulatio alteri*, it requires the third

## 5.1 Regulation restricted by limited *locus standi in iudicio*

The first problem with the privity doctrine in the context of state commercial activity is that it severely restricts *locus standi* to challenge such state conduct. In relation to the judicial regulation of state commercial activity this has a significant impact since it limits the opportunities for applying regulation. Because of privity, only a very limited category of persons can bring cases of state commercial activity before the courts. As a result the scale of judicial regulation is significantly limited: the courts scrutinise few cases. If one adds to this the high costs of litigation, which again reduces the already small group of potential litigants, it becomes clear that privity of contract has a very real impact on restricting regulation in the sense of quantity.

By limiting standing to the contracting parties the privity doctrine also denies many parties that may have a clear interest in the contractual relationship the opportunity to seek regulation of the state's actions. In relation to state commercial activity the interests affected undoubtedly extend beyond those of the immediate parties to the contract. In many instances of state commercial activity the resultant relationships can more properly be described as "triangular" or "multi-partite" than "bi-polar" as the privity doctrine would imply.<sup>455</sup> The state typically contracts with a private service provider to render services directly to the public. Although only the state and private

---

party to accept the benefit and hence "to come in as a party to a contract with one of the other two": *Joel Melamed & Hurwitz v Cleveland Estates (Pty) Ltd; Melamed & Hurwitz v Vornier Investments (Pty) Ltd* 1984 3 SA 155 (A) at 172; *Crookes v Watson* 1956 1 SA 277 (A) at 291. It follows that the third party cannot enforce the original contract, so that even in such instances privity is maintained between the original contracting parties. The impact of the privity doctrine is also softened by the expanding sphere of delictual liability so that it may be possible for a third party to indirectly obtain benefit from a contract by means of a delictual claim for pure economic loss, see Cockrell (1992) 109 SALJ 40 at 50 – 53. However, South African courts seem to be reluctant to extend delictual liability in relation to state commercial activity (see par 2.3.2.3 and par 2.4.5 above), which may hamper this impact of delict on the privity doctrine.

<sup>455</sup> Harlow & Rawlings *Law and Administration* 140; Freedland 1994 *Public Law* 86 at 99; Baxter *Administrative Law* 58.

service provider may be parties to the state contract, and thus have privity in relation to that contractual relationship, the members of the public relying on this service clearly also have an interest in that contractual relationship. In private law analysis, however, privity of contract would prevent them from approaching a court to scrutinise the state's actions relating to this public service.<sup>456</sup> In more general terms the public at large has an interest in the proper execution of state functions, even when those are commercial in nature,<sup>457</sup> so that the public generally should have standing to enforce regulation of that conduct,<sup>458</sup> something which privity prevents.

The recognition of the wider interests involved in all state action is evidenced by the wide standing provisions contained in section 38 of the Constitution.<sup>459</sup> That section allows a wide group of persons to enforce the

---

<sup>456</sup> Seddon *Government Contracts* 39; Freedland 1994 *Public Law* 86 at 99 – 100. Aronson in Taggart (ed) *The Province of Administrative Law* 56 notes in this regard: “[I]t is in the nature of outsourcing that the consumer has no more say in the formation or terms of the contract than in the pre-outsourcing days when government provided the service direct.” This is also illustrated by a number of South African judgements in which unsuccessful tenderers for state contracts were denied standing, because it was argued that “[u]nless and until his tender is accepted, a person in the position of the applicant [the unsuccessful tenderer] is effectively a stranger to the tender process”: *SA Metal Machinery Company Ltd v Transnet Ltd* 1999 1 BCLR 58 (W) at 66.

<sup>457</sup> See chapter three at par 4.1 above.

<sup>458</sup> Mitchell *The Contracts of Public Authorities* 236 – 237 notes that one of the specific results of the development of a separate institution of administrative contract in France is that “the rights of third parties are enlarged both as to claims as beneficiaries under the contract and as persons interested in the operation of the administration.”

<sup>459</sup> Section 38 reads: Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.

Bill of Rights, including the section 33 right to administrative justice.<sup>460</sup> It is clear that the Constitution envisages a much wider range of interests being protected by judicial regulation of state conduct than the privity doctrine would allow.

## **5.2 Limiting the interests relevant to the regulation of state conduct**

The concern regarding the privity doctrine in the current context goes further than simply a procedural issue of *locus standi*. It also has the effect of limiting the substantive interests that are regarded as relevant in regulating state commercial activity. Not only are third parties and the public in general barred from enforcing judicial regulation of such state conduct, but their interests are also removed from private law regulatory scrutiny. In the private law approach such wider interests simply never enter the regulatory picture. This has the effect of reducing the perceived impact of the regulated conduct. Since the wider interests involved are not placed before the court the wider impact of the (state) conduct on the environment and society is made to seem less important.<sup>461</sup> This obviously has a significant impact on the court's weighing of interests which inevitably informs (whether expressly or not) the court's conclusions. As Collins notes "the contractual relation creates new, more specific expectations, but simultaneously it tends to exclude the surrounding normative context in the evaluation of whether those expectations have been fulfilled or disappointed."<sup>462</sup>

---

<sup>460</sup> See also s 167(6) of the Constitution, which contains a wide "interests of justice" test for standing in constitutional matters, which would include all exercises of state power.

<sup>461</sup> Freedland 1994 *Public Law* 86 at 100 notes another way in which the privity doctrine reduces the public interests involved in state conduct. He argues that where the relationships between the state and citizens are analysed in terms of contract, the result is that each instance of interaction amounts to a single contract, isolating it from other identical relationships and hence breaking up the cumulative public interest. He states: "By insisting on the exclusiveness of the bi-partite contract, the doctrine of privity of contract both practically and symbolically singles out the interest of the individual as consumer from the larger group interest of which it forms part, as well as from the general public interest."

<sup>462</sup> Collins *Regulating Contracts* 15.

There are, however, ways in which private law can soften this impact of the privity doctrine. One way is by recognising the specific needs of a class of contracting parties and developing rules that apply to that class.<sup>463</sup> This typically happens in the development of implied terms with the resultant emergence of specific types of contract.<sup>464</sup> In such a development the court may take note of the wider interests of the class of parties to which the specific contracting party before the court belongs and develop an implied term aimed at such wider interests.<sup>465</sup> Over time a set of rules may consequently develop that applies only to a certain type of contract and is aimed at interests beyond those of the parties appearing before the court in a given case. It may thus be possible for courts to develop rules, in the form of implied terms, specifically aimed at state contracts, that seek to regulate state conduct in protection of interests beyond those of the immediate contracting parties. However, the development of such rules will still hinge on privity, in the sense that a first party must argue in favour of these wider interests in a given case.<sup>466</sup> To the extent that the privity doctrine excludes such interests altogether; it is unlikely that these interests will ever be forcefully put before the court to induce the required development of implied terms.

There are also indications of a developing sensitivity to the wider interests affected by commercial activity than a strict application of privity of contract would recognise in other areas of private law. In the context of companies there has emerged over the last few years a growing recognition of principles of good corporate governance, which focus on interests beyond those of the company, its shareholders and trading partners.<sup>467</sup> Typically

---

<sup>463</sup> Collins *Regulating Contracts* 23. Examples of such classes may be consumers, tenants and employees.

<sup>464</sup> See par 2.5.2 above for a discussion of the development of implied terms.

<sup>465</sup> Collins *Regulating Contracts* 23.

<sup>466</sup> Brand JA noted this role of the initial party in the development of an implied term when he stated in *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) at par 28: "The particular parties and set of facts can serve only as catalysts in the process of legal development."

<sup>467</sup> Khoza & Adam *The Power of Governance* 25; Du Plessis, McConvill & Bagaric *Principles of Contemporary Corporate Governance* 3 – 6, chapter 2; King Committee on Corporate



these would include a sensitivity to the impact of the company's activities on the environment, the wider personal needs of its employees, the effect of decisions on the wider community in which it operates as well as on the public in general.<sup>468</sup> Although most of these developments have not found its way to direct legal enforceability, it certainly informs justiciable legal rules such as duties of care resting on company directors.<sup>469</sup> These developments may provide a back-door escape route from the limiting impact of privity of contract in regulating state commercial activity, especially where such activity is undertaken in the form of private law companies.

### 5.3 Privity as a way of managing complexity

The privity doctrine finally has the effect of reducing complexity in the regulation of the contractual relationship. Collins puts it thus: "The contract constructs an image of the human association that reduces its complexity to the elements and trajectories that have significance within the contractual framework."<sup>470</sup> This effect of privity holds a potential benefit for the regulation of state commercial activity under an exclusively private law approach. By reducing the complexity surrounding state commercial activity, which is to a large extent a result of the many and wide-ranging interests involved, private law regulation focuses the court's attention on the immediate interests at stake in the case at hand. This is a positive effect since it allows the court to assess only the specific concerns that gave rise to the present litigation. In other words, it focuses the court's scrutiny on the issue that requires regulatory attention. In this way the privity doctrine may even be said to link up with the argument for increased efficiency by means of private law

---

Governance *King Report on Corporate Governance for South Africa - 2002* "Introduction and Background" par 17, section 4.

<sup>468</sup> Khoza & Adam *The Power of Governance* 25; Du Plessis, McConville & Bagaric *Principles of Contemporary Corporate Governance* 3 – 6, chapter 2; King Committee on Corporate Governance *King Report on Corporate Governance for South Africa - 2002* "Introduction and Background" par 17, section 4.

<sup>469</sup> Khoza & Adam *The Power of Governance* 28. On duties of care and skill of company directors generally, see Cillers *et al Korporatiewe Reg* 142 – 144.

<sup>470</sup> Collins *Regulating Contracts* 15.

regulation, but this time efficiency *in* regulation. Privity of contract structures the regulatory process in such a way that only specific and immediate problems require the intervention of the regulator, that is, the court. There is no need for abstract and general regulatory action, which would attempt to cover all possible contingencies, some of which may never occur and others only in divergent form. This can be argued to be efficient regulation.<sup>471</sup> Following this approach it is also less likely that the specific private counterparty's interests will be lost in the (often overwhelming) "big picture" of state commercial activity in all its complexity.<sup>472</sup>

The main advantage is the way in which the privity doctrine seems to manage complexity itself. It has often been recognised that courts are not well-placed to assess and rule upon polycentric issues.<sup>473</sup> Not only does the litigation process force the issues into a bipolar framework, where "the consideration of the question [is] framed by the interests of the parties and the outcome led by the evidence presented by the parties, which distorts the

---

<sup>471</sup> See Posner *Economic Analysis of Law* 385: "[D]irect regulation ... tends to be more costly than common law regulation, because it is continuous; the common law machinery is invoked only if someone actually is hurt."

<sup>472</sup> One may argue that the specific private party's interests were indeed so lost in the "big picture" view adopted by the majority of the Constitutional Court in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC). Kirchner in Hoffmann-Riem & Schmidt-Aßmann (eds) *Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen* 70 – 71 makes a similar point with regard to the potential effect of a private law damages claim in the context of commercial regulation of eg unfair competition. He notes that while public law regulation may result in a shift in focus away from the protection of specific individuals, or market participants, a private law damages claim may ensure a regulatory focus on the specific interests of the individual in need of protection.

<sup>473</sup> See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 4 SA 490 (CC) at par 46 – 48; *Logbro Properties CC v Bedderson NO and Others* 2003 2 SA 460 (SCA) at para 20 – 22; Hoexter (2000) 117 SALJ 484 at 501 – 502. However, note the argument made by Plasket in Glover (ed) *Essays in Honour of AJ Kerr* 179 that the polycentric nature of public tender decisions with their "complex matrix of fact, policy and expectation makes public procurement decisions fertile ground for review for rationality and emphasises the importance of legal controls over the process to ensure that the public interest is furthered..."

multi-faceted nature of many of these ... decisions,”<sup>474</sup> but judges themselves are not particularly proficient in assessing all the complex policy considerations that drive such polycentric decisions. The privity doctrine thus assists in reducing the complexity to specific and well-defined parameters in which courts can effectively regulate such complex scenarios as presented by state commercial activity.

In order to accept the effect of the privity doctrine as positive one must acknowledge the limited nature of contract law regulation of state commercial activity. Contract law can thus only provide effective regulation of one aspect of state commercial activity and not of the entirety of such conduct. The arguments in paragraphs 5.1 and 5.2 above show that many other aspects of such state action remain outside the private law regulatory net. This reinforces the view that private law cannot effectively regulate state commercial activity on its own, but at the same time it confirms that private law has an important or valuable role to play in such regulation. It foreshadows the argument that I will pursue further in chapter six regarding the necessity for a combination of private and public law forms in establishing effective judicial regulation of state commercial activity.

## 6 Conclusion

The analysis in this chapter has shown that private law, primarily the law of contract, *can* go quite far towards effective regulation of state commercial activity. As such it is unquestionably a viable form of regulation with advantages over other forms. The analysis above identified a number of doctrines and rules within private law that provide considerable scope and flexibility for the internalisation of specific policy demands in the context of state commercial activity within a private law regulatory approach. These are mostly doctrines based on open-ended value judgements such as public policy and the *boni mores*. In particular the rules regarding improperly

---

<sup>474</sup> Black & Muchlinski in Black, Muchlinski & Walker (eds) *Commercial Regulation & Judicial Review* 9, who present this argument in the context of judicial review of commercial regulation decisions in English law. See also Cane in Parker *et al* (eds) *Regulating Law* 217 for a similar argument in relation to access to information.

obtained consent, illegality, implied terms and estoppel show potential in this respect. However, in most of these instances, current development stops short of reaching that full potential.<sup>475</sup> Values that have traditionally wielded considerable influence over the development of the law of contract, such as freedom of contract and *pacta sunt servanda*,<sup>476</sup> seem to inhibit the development of many of the rules noted above towards full realisation of its regulatory potential in the context of state commercial activity.<sup>477</sup> However, the Constitution creates a new impetus for the further development of contract law rules to meet concerns of fairness and reasonableness in state contracting. These new incentives are of such a nature that they do not necessitate the general development of the rules of contract law towards increased sensitivity to substantive fairness and reasonableness, something which South African law has been particularly reluctant to embrace to date.<sup>478</sup>

---

<sup>475</sup> Mewett (1958) 5 *McGill LJ* 222 at 241 argues that public policy is a “disabling concept” rather than an “enabling concept” so that it can only “be utilised to declare certain contracts or certain terms void” rather than stimulate more positive legal development, which would grant positive rights or powers to parties in response to unique aspects of state commercial activity.

<sup>476</sup> Lubbe (1990) 1 *Stell LR* 7 argues convincingly that most of these so-called values, such as “freedom of contract”, “*pacta sunt servanda*”, “consensualism” and “freedom of trade” are not values at all, but merely characteristics of a (regulatory) system that is aimed at or premised on particular (public) policy objectives such as the protection of private autonomy as a basic premise of capitalist theories of wealth maximisation in a free-market economy.

<sup>477</sup> Van der Walt 2005 *TSAR* 655 at 674 notes: “The decision to entrench private law rules such as sanctity of contract on a constitutional foundation sets up a reactionary and potentially destructive barrier in the way of transformation...” See also Lubbe (2004) 121 *SALJ* 395 at 420: “Of particular interest is the reliance in *Afrox* on Cameron JA’s statement in *Brisley v Drotsky* regarding the functioning of the rights to equality, freedom and dignity as buttresses for the general recognition in our law of freedom and sanctity of contract. The concern in *Afrox* was simply to support the notion of *pacta sunt servanda*, no need being perceived for an elaboration of the inherent complexities of these concepts. When used in such an un-nuanced manner, equality, freedom and dignity work in only one direction, serving to dissipate pressure on traditional doctrines and to stultify a creative tension that might result in the wholesome development of the common law” (footnotes omitted).

<sup>478</sup> This reluctance is certainly not restricted to courts, but extends to the legislature as well as is evident from its failure to act on the recommendations of the SALC regarding the statutory regulation of unfair contract terms. See SALC *Unreasonable Stipulations in Contracts and the Rectification of Contracts* and par 2.2.3 above.

The Constitution contains a number of provisions aimed at state activity that can serve as a basis for such a development of private law, but restricted to the context of state commercial activity.<sup>479</sup>

However, the outlook is slim for significant development of private law rules to unlock its potential as a comprehensive and exclusive regulatory approach to state commercial activity in South Africa. There seems to be a growing tendency in South African courts to shield the state from private law liability, especially in commercial contexts. This inclination is illustrated by the line of recent decisions that have refused to attach delictual liability to the actions of the state in its tendering activities. A significant part of this tendency and one that will certainly restrain the type of development suggested in the previous paragraph is the courts' reluctance to treat the state differently from other commercial players in the application of private law rules.<sup>480</sup>

Apart from the obstacles that may stand in the way of the required development of private law rules towards effective regulation of state commercial activity, there are also a number of inherent problems that limit private law's ability to achieve regulatory goals in this context. Foremost among these is the doctrine of privity of contract. The effect of this doctrine is to exclude third party interests from the regulatory compass. This effect is highly problematic in the context of state commercial activity where commercial relationships often include a third party dimension, typically when

---

<sup>479</sup> Eg Constitution s 195, s 217.

<sup>480</sup> This was certainly an important consideration in the denial of delictual liability in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) where Harms JA stated at par 33: "The right to relief does also not extend to a right to damages suffered as a result of not being awarded the contract. The public policy considerations are these: ... allowing tenderers on public works to collect damages when the work is improperly let to someone else places them in an advantageous position compared to tenderers on private projects, who have no such right" (footnotes omitted) and at par 45: "In ordinary contractual relations, one contracting party cannot without more hold the other liable in delict if the contract is void or voidable, even due to the fault of the latter. I can think of no good reason why it should be different where the contract is preceded or affected by an administrative action."

services are rendered to the public, but also more generally since the public at large has an interest in all state action, which does not disappear because of the commercial nature of that action. However, the problem here is perhaps even deeper-seated than allowing third parties to enter the regulatory picture. It arguably points to a fundamental disjunction between contract law's basic underlying conception of social ordering and current constitutional views of the state and its function or role in society. Collins summarises Philip Selznick's analysis of the "paradigm meaning of contract" extracted from legal doctrine as: "In short, contractual relations conceive of patterns of human association as individualized and confined, rather than collective and indeterminate."<sup>481</sup> It is perhaps exactly this individualised and confined perspective of contract law that seems out of tune with the collective nature of state activity.<sup>482</sup> If contract law is to function as an effective form of regulation of state commercial activity then, as Mark Freedland argues, "our primary

---

<sup>481</sup> Collins *Regulating Contracts* 14, with reference to Selznick *Law, Society and Industrial Justice*. Collins criticises Selznick's analysis as "too closely attached to the legal perspective ... [of] the meaning of contracts." For present purposes this criticism is of less concern, since I am dealing here with the law of contract as a (legal) regulatory instrument, rather than contract as a social practice, which is the subject of Collins' analysis.

<sup>482</sup> Duncan Kennedy argues that "[i]ndividualism provides a justification for the fundamental legal institution of ... contract" and that "[t]he essence of individualism is the making of a sharp distinction between one's interests and those of others, combined with the belief that a preference in conduct for one's own interests is legitimate ... it means a firm conviction that I am entitled to enjoy the benefits of my efforts without an obligation to share or sacrifice them to the interests of others." In contrast, he identifies the "counterethic" of altruism as "the belief that one ought *not* to indulge a sharp preference for one's own interest over those of others. Altruism enjoins us to make sacrifices, to share, and to be merciful": Kennedy (1976) 89 *Harvard LR* 1685 at 1713-1721; see also Cockrell (1992) 109 *SALJ* 40 for an application of Kennedy's arguments to South African contract law. I would argue that the current constitutional dispensation in South Africa endorses an altruistic view of (at least) the state (and arguably private actors as well) and that contract law with its strong focus on individualism, at least in the traditional view, is therefore ill-suited to regulate state activity. Even where specific contract law rules can thus provide effective control of particular aspects of state commercial activity this fundamental disconnect remains. As Cockrell (1992) 109 *SALJ* 40 at 54 notes in relation to the use of implied terms to infuse contracts with fairness and reasonableness: "A communitarian standard for the content of contractual obligation is thus achieved while remaining true to the language of individualism."

concern should be to ensure that these private law-based instruments are tuned to register the sound of public interest.”<sup>483</sup> This brings one back to the question raised in the previous two paragraphs of the further development of specific private law rules towards increased scrutiny of substantive fairness and reasonableness, at least in the narrow context of state commercial activity.<sup>484</sup>

Despite the obstacles in fashioning effective regulation of state commercial activity from private law and in particular the law of contract, such a system may hold significant advantages, which might be lost if private law is simply rejected as a viable regulatory option. These include increased efficiency, the management of complexity and high levels of reflexivity. The efficiency claim is relatively straightforward and need not detain us much further here. It entails that private law regulation allows the state more

---

<sup>483</sup> Freedland in Craig & Rawlings (eds) *Law and Administration in Europe* 134.

<sup>484</sup> More generally, in order for private law and in particular contract law to achieve its full potential as a regulatory system that can meet the diverse needs of the large variety of contexts in which it (potentially) finds application, there is a need to theoretically move away from the paradigm view of contract as a monolithic notion aimed at commercial exchange between essentially two autonomous parties towards a more plural view that embraces differentiation between different contexts of contracting, even at the most fundamental doctrinal level. Lubbe (2004) 121 *SALJ* 395 at 419 argues that Smalberger JA’s judgement in *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) as interpreted in *Brisley v Drotsky* 2002 4 SA 1 (SCA) may be read as providing a basis for such development: “Smalberger JA’s further statement in *Sasfin*, to the effect that it had to be borne in mind that ‘public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by the restrictions on that freedom’, while affirming the general point of departure of our law, also provides some basis for the proposition that there might be room for a differentiated approach in respect of contracts that do not amount to arm’s length transactions involving purely commercial interests ... The true significance of the *Brisley* gloss on *Sasfin* is, therefore, that it confirms that the ... decision established the foundation on which the undifferentiated notion of good faith or interpersonal fairness may, on a case-by-case basis, be elaborated by the courts through the identification of factual variables which require that situations which on the present understanding of contract law fall within the selfsame legal category be accorded a differentiated treatment.” (footnotes omitted). In chapter six below I will explore ways in which a combined public-private law approach to the judicial regulation of state commercial activity can encourage such development of contract law.

freedom to participate in the market which must subsequently lower transaction costs. It is also worth noting that efficiency is an explicit constitutional imperative.<sup>485</sup> Although privity of contract may be viewed as a problematic aspect of contract law as far as the regulation of state activity is concerned it may also be useful in managing complexity. State commercial activity often consists of polycentric decision-making, which is not easily regulated by judicial means.<sup>486</sup> Privity of contract may assist in reducing the complexity inherent in these instances by focusing the court's attention on only one specific aspect that requires judicial intervention and by ensuring that the interests before the court, especially those of the individual private counter-party, are not "lost" in the bigger picture of the entire state commercial endeavour in all its dimensions. However, both efficiency and privity are clearly two-edged swords, cutting both in favour of and against private law regulation of state commercial activity.<sup>487</sup> Reflexivity is the one quality of private law that does seem to stand out as a highly desirable attribute of an effective regulatory regime.

As the discussion of reflexivity noted, it is an important attribute of the viable regulation of social practices in highly plural contexts. State commercial activity in South Africa is unquestionably such a practice. It varies from highly sophisticated transactions with multi-national financial institutions in sophisticated markets such as international interest rate swaps to basic transactions with extremely unsophisticated counter-parties such as lease agreements of government owned land or housing to previously disadvantaged individuals or communities. I argued in chapter three that

---

<sup>485</sup> See the Constitution s 33(3)(c), s 195(1)(b), s 217(1).

<sup>486</sup> See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 4 SA 490 (CC) at par 46 – 48 and *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management and Others* 2006 2 SA 199 (C) at 210 where Davis J referred to courts' "lack of institutional equipment to decide policy matters which relate to allocation of resources." It is submitted that much of state commercial activity will fit this bill.

<sup>487</sup> The analysis of the efficiency argument has shown that private law regulation may also decrease government efficiency, especially where it leads to the legal binding of the state when more freedom of action to change course is required.



attempts to categorise these actions are doomed to fail, because the classification criteria cannot be consistently or definitively circumscribed. This suggests that reflexivity is an important element in designing any effective regulatory system for state commercial activity. Contract law, with its high level of reflexivity, can thus make a valuable contribution to such design. But, as the analysis noted, there are also problems with contract law's reflexivity in the context of state commercial activity. The answer is not to reject contract law as regulatory system in favour of less reflexive systems such as administrative law, but to address the specific issues that reduce reflexivity while keeping contract law as part of the regulatory system. This view implies that some mixture of private and public law will be required to achieve optimal regulation of state commercial activity. I shall return to this view in chapter six below.



## CHAPTER FIVE

### COMPREHENSIVE PUBLIC LAW APPROACH

#### 1 Introduction

In the previous chapter I investigated a first alternative to the current classification approach to judicial regulation of state commercial activity in South Africa, discussed in chapter three. The first alternative discussed earlier focuses on the commercial nature of the action under scrutiny and consequently utilises private law, primarily the law of contract, exclusively as a regulatory tool in such instances. I argued that although the private law approach has potential to achieve effective judicial regulation, much development is still needed to unlock that potential. My analysis concluded that the full realisation of such development currently seems unlikely to occur in South African law. I furthermore argued that there seems to be a fundamental disjunction between contract law's basic underlying conception of social ordering and current constitutional views of the state and its function or role in society. This disjunction poses a serious obstacle to the fashioning of an exclusively private law regulatory regime in the current context. In this chapter I accordingly investigate another alternative to the classification approach of chapter three and the exclusively private law approach of chapter four, namely a comprehensive public law approach.

The approach discussed in this chapter is to apply public law, in particular administrative law, to all forms of state commercial activity. In essence this is done by viewing all state commercial activity as administrative action. It is important to note that this approach does not exclude private law regulation similar to the exclusion of public law regulation in the approach discussed in chapter four. The approach under scrutiny in this chapter is thus not an *exclusively* public law one in the sense that the approach in chapter four was an exclusively private law one. Under the comprehensive public law approach private law still applies, but *always* in addition and subject to public law regulation. The approach discussed in this chapter is thus in many respects the most comprehensive form of judicial regulation analysed in this study, since both private and public law rules apply in all instances. However,

since it is the consistent application of public law rules to all instances of state commercial activity that distinguishes this approach from those discussed in the previous two chapters, the focus of this chapter will be on the public law aspect of the approach.

I start the analysis by asking whether South African law allows for a comprehensive public law approach. Are there any fundamental obstacles in the South African legal framework restraining courts from adopting such an approach? My conclusion is that there are no insurmountable barriers. I argue that development in the broader public law context, especially relating to the principle of legality, supports an approach that applies public law regulation to all instances of state action. I accordingly turn my attention to the desirability of a comprehensive public law approach. As Cora Hoexter notes, a public law approach seems to represent the most desirable form of regulating state contracting, that is, at least for public lawyers.<sup>1</sup> There are a number of advantages to such an approach, which I investigate below. These include the emphasis on the unique concerns raised by state commercial activity such as the spending of public money and the exercise of public functions using public power. A public law approach also seems to support the conception of just administrative action as an autonomous goal and not simply as a collateral or instrumental right. I further note how a comprehensive public law approach supports the constitutional vision of a transformed South African society. However, as Hoexter notes, there is also a downside to the public law approach.<sup>2</sup> The most obvious disadvantage is the efficiency implications of such an approach. These efficiency concerns

---

<sup>1</sup> Hoexter (2004) 121 *SALJ* 595 at 608. It should be noted, however, that the approach suggested here is somewhat different from the one discussed by Hoexter. She is dealing with the application of public law rules in terms of a classification approach as adopted by South African courts, ie cases where the court found some factor to conclude that the particular instance should be subjected to public law regulation, that is the approach discussed in chapter three above. The approach suggested here does not engage in any classification, but simply applies public law rules to all instances. Nothing much turns on this difference as far as the advantages of the public law approach are concerned, but it does make a difference regarding the potential disadvantages.

<sup>2</sup> Hoexter (2004) 121 *SALJ* 595 at 608 – 609.

are best viewed in direct opposition to the efficiency advantages of the exclusively private law approach discussed in chapter four.<sup>3</sup> Another concern flows from the difficulty in pinning down the exact ambit of the state and hence the scope of regulation under this approach. These concerns are analysed below in order to assess whether a public law approach to the regulation of state commercial activity is a viable judicial alternative to the approaches discussed in the previous two chapters.

## **2 A comprehensive public law approach within the South African legal framework**

The first question to consider is whether a comprehensive public law approach can exist within the current South African legal framework. Is it an option currently open to South African courts? The answer depends in part on whether all state commercial activity can be said to constitute administrative action. If that is the case, the rules of administrative law can always be applied on top of private law rules, which are applicable because of the commercial nature of the action under scrutiny. But the answer to the former question only depends in part on the latter. There is now a category of public law controls in South African law that does not depend on the relevant state action qualifying as administrative action.

### **2.1 State commercial activity as “administrative action”**

#### **2.1.1 “Administrative action” at common law**

At common law administrative law knew no precise definition of administrative action and seems to have had little need for such a concept.<sup>4</sup> The rules of

---

<sup>3</sup> See chapter four at par 3 above.

<sup>4</sup> Hoexter *Administrative Law in South Africa* 165; Burns & Beukes *Administrative Law under the 1996 Constitution* 107; De Ville *Judicial Review of Administrative Action in South Africa* 35 – 36; *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) per Olivier JA at par 33. In *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 6 SA 313 (SCA) Nugent JA declared at par 21: “What constitutes administrative action - the exercise of the administrative powers of the State - has always eluded complete definition.”

administrative law applied with varying degrees to different types of state action. Over time a system of classification of administrative functions developed that dictated the application of specific administrative law rules.<sup>5</sup> While the nature of the administrator and/or action under scrutiny mostly determined the label attached to the relevant action, the impact of the action also played a critical role in applying certain rules. Especially in relation to the rules of procedural fairness,<sup>6</sup> an adverse impact on the “existing rights, privileges and liberties” of an individual was required.<sup>7</sup> This requirement was later extended to include action impacting on legitimate expectations.<sup>8</sup>

As my analysis in chapter three indicated, state commercial activity was occasionally subjected to administrative law regulation at common law.<sup>9</sup> The precise measure of administrative law control depended on the nature of the specific commercial decision taken by the organ of state. It was only in

---

<sup>5</sup> The basic classification labelled administrative action as legislative, judicial or (purely) administrative: Wiechers *Administratiefreg* 96 – 170; Baxter *Administrative Law* 344 – 348; Hoexter *Administrative Law in South Africa* 49 – 54, 166.

<sup>6</sup> At common law restricted to the rules of natural justice: *audi alteram partem* and *nemo iudex in propria causa*.

<sup>7</sup> This type of administrative action was labelled “quasi-judicial” administrative action: Wiechers *Administratiefreg* 243 – 248; Baxter *Administrative Law* 577 – 580; Hoexter *Administrative Law in South Africa* 351 – 353.

<sup>8</sup> *Administrator, Transvaal, and Others v Traub and Others* 1989 4 SA 731 (A). In this case Corbett CJ also questioned the continued relevance of the classification of functions as a basis for determining the application of the rules of natural justice. Subsequently, in *South African Roads Board v Johannesburg City Council* 1991 4 SA 1 (A) at 10 Milne JA declared that “this Court has now moved away from the classification of powers as, for example, judicial, quasi-judicial or purely administrative in order to determine whether the audi principle applies” and continued to rely directly on the impact of the action as the basis for the application of the rules of natural justice. See Hoexter *Administrative Law in South Africa* 353 – 357; Pretorius (2000) 63 *THRHR* 93.

<sup>9</sup> Examples of such cases are *Administrator, Transvaal and others v Zenzile and Others* 1991 1 SA 21 (A); *Opperman v Uitvoerende Komitee van die Verteenwoordigende Owerheid van die Blankes en Andere* 1991 1 SA 372 (SWA); *Administrator, Transvaal and Another v Sibiyi and Another* 1992 4 SA 532 (A); *Ramburan v Minister of Housing (House of Delegates)* 1995 1 SA 353 (D). See also Hoexter (2004) 121 *SALJ* 595 at 605 – 609; Pretorius (2002) 119 *SALJ* 374.

instances where the relevant decision was “virtually severed” from its statutory setting<sup>10</sup> or amounted to an exercise of the prerogative powers that the relevant state commercial activity did not amount to administrative action at common law. As I argued in chapter three, the strong reliance on source as the critical factor in subjecting state commercial activity to administrative law controls is open to considerable manipulation.<sup>11</sup> By aiming the source analysis at various levels of generality the applicability of administrative law rules can be significantly influenced. It follows that, barring only exercises of the prerogative powers, a comprehensive public law approach was indeed a viable option under common law.

### 2.1.2 The PAJA definition

The enactment of the 1993 and 1996 Constitutions and the subsequent enactment of PAJA brought the concept of administrative action centre stage in the application of administrative law. Section 33 of the Constitution guarantees the right to just *administrative action*.<sup>12</sup> This concept inevitably became the gateway to the section 33 rights.<sup>13</sup> If one further keeps in mind that section 33 is now regarded as the foundation of administrative law (at least from a judicial perspective),<sup>14</sup> the critical significance of “administrative

---

<sup>10</sup> Kahn 1958 ASSAL 1 at 23 (describing the majority’s approach in *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A)).

<sup>11</sup> See chapter three at par 3.2.5 above.

<sup>12</sup> Both subsections (1) and (2) expressly link the rights created in the section to the concept of administrative action.

<sup>13</sup> Hoexter *Administrative Law in South Africa* 164 – 165.

<sup>14</sup> *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 2 SA 311 (CC) at par 118 (per Chaskalson CJ); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 4 SA 490 (CC) at par 22 – 23; *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 2 SA 674 (CC); Hoexter *Administrative Law in South Africa* 15 – 16, 26; Plasket *Post-1994 Administrative Law in South Africa: The Constitution, the Promotion of Administrative Justice Act 3 of 2000 and the Common Law*.

action” becomes apparent. Section 33 has been codified in PAJA,<sup>15</sup> which contains a comprehensive definition of administrative action.<sup>16</sup> This definition thus provides the framework for the application of administrative law and is accordingly central to the question whether a comprehensive public law approach can be adopted in South African law.

Section 1(i) of PAJA reads:

**“administrative action”** means any decision taken, or any failure to take a decision, by—

- (a) an organ of state, when—
  - (i) exercising a power in terms of the Constitution or a provincial constitution; or
  - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect...

It continues to list a number of exclusions from the definition, including the executive powers and functions of the national,<sup>17</sup> provincial<sup>18</sup> and local executives.<sup>19</sup>

---

<sup>15</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 4 SA 490 (CC) at par 25; *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 2 SA 311 (CC) at par 95 (per Chaskalson CJ); *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 SCA 25 (RSA) at par 63; Plasket *Post-1994 Administrative Law in South Africa: The Constitution, the Promotion of Administrative Justice Act 3 of 2000 and the Common Law*.

<sup>16</sup> PAJA s 1(i).

<sup>17</sup> PAJA s 1(i)(aa): the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79 (1) and (4), 84 (2) (a), (b), (c), (d), (f), (g), (h), (i) and (k), 85 (2) (b), (c), (d) and (e), 91 (2), (3), (4) and (5), 92 (3), 93, 97, 98, 99 and 100 of the Constitution.

<sup>18</sup> PAJA s 1(i)(bb): the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121 (1) and (2), 125 (2) (d), (e) and (f), 126, 127 (2), 132 (2), 133 (3) (b), 137, 138, 139 and 145 (1) of the Constitution.



### **2.1.2.1 An adverse impact on rights and direct, external legal effect**

As I noted in chapter three, the two elements of the definition of administrative action requiring an adverse impact on rights and a direct, external legal effect are of the most problematic provisions in PAJA.<sup>20</sup> It is not necessary to repeat the criticism against these components of the definition here. It will suffice to note that following the judgement in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*<sup>21</sup> these elements, which can be viewed as one impact requirement, do not present any serious difficulties in applying a comprehensive public law approach in South African law. In a significant reading down of the impact element of the definition, Nugent JA concluded that administrative action is action that “has the capacity to affect legal rights,” that “impacts directly and immediately on individuals” and that has “direct and immediate consequences for individuals or groups of individuals.”<sup>22</sup> In applying this broad reading of the definition, the court concluded that the lease of state land at issue amounted to administrative action because of the “immediate and direct legal consequences” for the successful tenant.<sup>23</sup> It is difficult to imagine state commercial activity that will not have a similar effect on individuals or groups of individuals. Accordingly, most state commercial activity will satisfy this aspect of the definition of administrative action in PAJA.

### **2.1.2.2 Executive action excluded**

It is possible that some state commercial activity may be excluded from the definition of administrative action by one of the executive action exclusions in sections 1(i)(aa), (bb) or (cc) of PAJA. The line between executive and

---

<sup>19</sup> PAJA s 1(i)(cc): the executive powers or functions of a municipal council.

<sup>20</sup> See chapter three at par 3.6.3 above.

<sup>21</sup> 2005 6 SA 313 (SCA). See chapter three at par 3.6.3 above for a discussion of this case.

<sup>22</sup> *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 6 SA 313 (SCA) at par 23 – 24.

<sup>23</sup> *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 6 SA 313 (SCA) at par 28.

administrative action is not an easy one to draw.<sup>24</sup> South African courts have broadly held that the former category refers to policy formulation and the initiation of legislation, while the latter primarily includes the implementation of legislation.<sup>25</sup> Where the executive at any level of government thus engages in commercial activity that is not directly linked to a legislative mandate, it may be possible to argue that such actions are executive in nature and hence excluded from the definition of administrative action in PAJA. Such an argument will be especially forceful where a clear policy objective underlying the commercial activity can be identified.<sup>26</sup>

Another line of argument that may support the categorisation of state commercial activity as executive action and hence excluded from the PAJA definition is based on the prerogative powers. As I argued in chapter two, at common law and prior to the enactment of the 1993 Constitution the non-statutory commercial powers of the state most likely resided in the prerogative powers.<sup>27</sup> Although the Constitutional Court ruled in *President of the Republic*

---

<sup>24</sup> *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) at par 143; Currie & Klaaren *The Promotion of Administrative Justice Act Benchbook* 56.

<sup>25</sup> *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) at par 140 – 147; *Permanent Secretary, Department of Education and Welfare, Eastern Cape, and Another v Ed-U-College (PE) (Section 21) Inc* 2001 2 SA 1 (CC) at par 18. The central role of policy in this distinction is confirmed by the specific exclusions in subsections (aa) and (bb) of the functions listed in s 85(2)(b) (national executive “developing and implementing national policy”) and s 215(2)(d) (provincial executives “developing and implementing provincial policy”) of the Constitution.

<sup>26</sup> The state often uses commercial activity as a way of furthering government policies and the identification of state commercial activity with specific government policy will thus mostly be quite easy. On state contracts and policy see Arrowsmith (2006) 35 *Public Contract Law Journal* 337, (1995) 111 *LQR* 235; Bolton (2004) 121 *SALJ* 619, *The Law of Government Procurement in South Africa* chapter 10; Arrowsmith, Linarelli & Wallace *Regulating Public Procurement* chapter 5; Seddon *Government Contracts* 16; Daintith in Jowell & Oliver (eds) *The Changing Constitution* 196 *et seq.*, (1979) 32 *Current Legal Problems* 41; Harlow & Rawlings *Law and Administration* 207 – 210; Turpin *Government Procurement and Contracts* 73 – 79; Arnould (2004) 13 *Public Procurement LR* 187.

<sup>27</sup> See chapter two at par 3.1.2.1 above.

of *South Africa and Another v Hugo*<sup>28</sup> that the royal prerogative has ceased to be an independent source of executive power in South Africa, those powers largely continue to exist under a different label,<sup>29</sup> namely executive powers derived directly from the Constitution.<sup>30</sup> This is the category of action that is excluded from the definition of administrative action in section 1(i)(aa) of PAJA. It follows that the exercise of such power in the form of state commercial activity continues to be excluded from the ambit of administrative action under the Constitution by means of the executive action exclusion in PAJA.

It is important to note that the exclusion of state commercial activity from the definition of administrative action in PAJA by means of the executive action exclusions<sup>31</sup> is not fatal to the feasibility of a comprehensive public law approach. As I indicate below, such executive action is still subject to public law regulation in the form of the legality principle.<sup>32</sup>

### 2.1.2.3 A decision of an administrative nature

At first blush the restriction of administrative action to decisions may seem particularly limiting. However, the separate definition of “decision” in section 1(v) of PAJA significantly counters such limitation,<sup>33</sup> especially the “catch-all”

---

<sup>28</sup> 1997 4 SA 1 (CC) at par 8.

<sup>29</sup> It is clear that not all of the historical prerogative powers continue to exist under the Constitution. One example is the power to deport aliens, which was originally part of the royal prerogative, but is not listed in s 84 of the Constitution along with the other traditional prerogative powers and is hence now dependent on statutory authorisation: *Mohamed and Another v President of the RSA and Others* 2001 3 SA 893 (CC) at par 31 – 32.

<sup>30</sup> *Mohamed and Another v President of the RSA and Others* 2001 3 SA 893 (CC) at par 31; *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) at par 144 – 147; *President of the Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC) at par 7 – 8.

<sup>31</sup> PAJA s 1(i)(aa), (bb), (cc).

<sup>32</sup> See par 2.2 below.

<sup>33</sup> PAJA s 1(v): “decision” means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to—

(a) making, suspending, revoking or refusing to make an order, award or determination;

provision in section 1(v)(g), which includes in the definition “a decision relating to ... doing or refusing to do any other act or thing of an administrative nature.” It is difficult to imagine any state action, including of a commercial nature, that will not be preceded by a decision falling within one of the subsections of section 1(v). Furthermore, those subsections are not exhaustive instances of the term “decision”.<sup>34</sup>

More problematic for present purposes is the qualifier “of an administrative nature” in the definition of “decision”. This will probably present one of the biggest obstacles for the inclusion of all state commercial activity within the concept of administrative action as defined by PAJA. Although the exact import of this phrase is not clear,<sup>35</sup> it has been argued to carry at least some notion of public action to the exclusion of private action.<sup>36</sup> One sees the familiar classification approach of state action falling into the categories of private law or public law emerging here. Burns & Beukes expressly note that the purpose of the phrase “of an administrative nature” is to exclude “private law matters such as the conclusion of a contract of sale” from the ambit of

- 
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
  - (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
  - (d) imposing a condition or restriction;
  - (e) making a declaration, demand or requirement;
  - (f) retaining, or refusing to deliver up, an article; or
  - (g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly.

<sup>34</sup> This is made clear by the use of the word “including” that introduces the subsections. Hoexter *Administrative Law in South Africa* 187; *Van Zyl v New National Party and Others* 2003 3 All SA 737 (C) at par 88.

<sup>35</sup> Hoexter *Administrative Law in South Africa* 190 describes it as “something of a puzzle” and in *Van Zyl v New National Party and Others* 2003 3 All SA 737 (C) at par 89 Van Reenen J declared: “It is no easy task to determine the precise meaning of the concept ‘... any decision ... of an administrative nature’ in the definition of ‘decision’.”

<sup>36</sup> Burns & Beukes *Administrative Law under the 1996 Constitution* 133; De Ville *Judicial Review of Administrative Action in South Africa* 40, 44; Currie & Klaaren *The Promotion of Administrative Justice Act Benchbook* 47 – 48; *Van Zyl v New National Party and Others* 2003 3 All SA 737 (C) at par 89.

“administrative action” and hence administrative law.<sup>37</sup> This interpretation of the term “decision” and accordingly the concept of administrative action seems to lock the classification approach<sup>38</sup> into the core framework of South African administrative law. It accordingly rules out the application of a comprehensive public law approach in South African law.

Such an interpretation and outcome cannot be accepted. Firstly, it is based on the view that one can usefully distinguish between private and public activity of the state with reference to criteria such as public power or public function. As I argued in chapter three,<sup>39</sup> this notion cannot be maintained since the outcome depends largely on arbitrary factors such as the proximity required between purpose, need and action. Secondly, in a number of recent decisions the courts have found that state commercial activity did amount to “decisions of an administrative nature.” In *Grey’s Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*<sup>40</sup> the court ruled that a decision to lease state land to a private company amounted to administrative action under PAJA. The court had no difficulty in reconciling the relevant decision with the phrase “decision of an administrative nature” and noted in support of its conclusion that the decision was taken “in the ordinary course of administering the property of the State.”<sup>41</sup> In *Steenkamp NO v Provincial Tender Board, Eastern Cape*<sup>42</sup> Moseneke DCJ ruled that a tender board’s awarding or refusing of a tender constitutes administrative action under PAJA. Again, the court had no difficulty in finding that such action qualified as a decision under PAJA. It is difficult to think of reasons why other forms of state commercial activity, such as Burns & Beukes’ contract of sale, should be treated differently from these examples in relation to the definition of decision in PAJA. Currie & Klaaren convincingly argue that this part of the definition of administrative action can mean no more

---

<sup>37</sup> Burns & Beukes *Administrative Law under the 1996 Constitution* 133.

<sup>38</sup> Discussed in chapter three above.

<sup>39</sup> See chapter three at par 3.5 above.

<sup>40</sup> 2005 6 SA 313 (SCA) at par 28.

<sup>41</sup> *Grey’s Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 6 SA 313 (SCA) at par 28.

<sup>42</sup> 2007 3 SA 121 (CC) at par 21.

than “decisions connected with the daily or ordinary business of government.”<sup>43</sup> Although the authors certainly do not use the word business as meaning a commercial enterprise, I can think of no reason why the state’s commercial activities, forming part of its daily and ordinary operation, should be excluded from this very general definition. In fact, in *Grey’s Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*<sup>44</sup> the court found the very general administration of state property to fall within its view of administrative action (also in terms of PAJA) as “in general terms, the conduct of the bureaucracy ... in carrying out the daily functions of the State.”

#### **2.1.2.4 Exercising a power in terms of a constitution or legislation**

For present purposes we are interested in subsection (a) of PAJA’s definition of administrative action focusing on conduct by organs of state. For such conduct to be administrative action it must be mandated by either a constitution, national or provincial, or legislation. In asking whether state commercial activity can always qualify as administrative action under PAJA we accordingly have to ask whether such activity can be mandated by any other source than a constitution or legislation.

In chapters two<sup>45</sup> and three<sup>46</sup> I presented the argument that the state always acts in terms of the Constitution at some level. Daniel Malan Pretorius’s arguments in this regard are particularly persuasive.<sup>47</sup> He argues that all state power, also those of a commercial nature, ultimately derives from the Constitution.<sup>48</sup> This argument finds support in *Grey’s Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*.<sup>49</sup> Pretorius

---

<sup>43</sup> Currie & Klaaren *The Promotion of Administrative Justice Act Benchbook* 51.

<sup>44</sup> 2005 6 SA 313 (SCA) at par 24.

<sup>45</sup> At par 3.1.2.3.2 above.

<sup>46</sup> At par 3.2 above.

<sup>47</sup> Pretorius (2002) 119 SALJ 374.

<sup>48</sup> Pretorius (2002) 119 SALJ 374 at 384.

<sup>49</sup> 2005 6 SA 313 (SCA) at par 20. See also *Transnet Ltd and Others v Chirwa* 2007 2 SA 198 (SCA) at par 52 (per Cameron JA for the minority); *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 1 SA 141 (SE) at par 21: “The State and its organs have no

further argues that contracts can only grant rights, not powers, so that it is theoretically unsound to argue that the state can act on the strength of powers granted to it by a contract.<sup>50</sup> While it may be correct to argue that the state may derive the *right* to cancel a contract from that contract, the *power* to do so must be pre-existing and flow from some other source.<sup>51</sup> These arguments seem particularly convincing in relation to the core institutions of the state: the national and provincial executives and national and provincial state departments, whose existence and activities are to a large extent governed by the Constitution and provincial constitutions. However, in relation to other organs of state, those created and/or mandated by ordinary legislation, the arguments seem less compelling. It may be that the only link between such organs of state and the Constitution is the constitutional mandate of Parliament to enact the legislation that created the relevant organ of state. This seems to be a rather tenuous link between the organ of state's actions and the Constitution.

Subsection (a)(ii), however, also provides for powers exercised in terms of ordinary legislation to qualify as administrative action. Since statutory bodies cannot generally act validly outside of their legislative powers, all action taken by such bodies will potentially be subject to administrative law regulation. It follows that the source requirements of the definition present no fundamental difficulties in adopting a comprehensive public law approach to the regulation of state commercial activity.

## **2.2 The generally applicable public law principle of legality**

The feasibility of a comprehensive public law approach to the regulation of state commercial activity does not, however, depend solely on the classification of all state commercial activity as administrative action. An important recent development in public law control of state action in South Africa has been the recognition of the general constitutional principle of

---

powers outside that granted to it by the Constitution or by legislation complying with the Constitution”.

<sup>50</sup> Pretorius (2002) 119 SALJ 374 at 385.

<sup>51</sup> Pretorius (2002) 119 SALJ 374 at 386.

legality. In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*<sup>52</sup> this principle was identified as part of the rule of law and accordingly as a foundational constitutional value.<sup>53</sup> In that case the court held that “[i]n relation ... to executive acts that do not constitute 'administrative action', the principle of legality is necessarily implicit in the Constitution.”<sup>54</sup> As a result the court could test such executive action on review against the legality principle regardless of the fact that the relevant action did not amount to administrative action. Cora Hoexter accurately describes this principle as “a kind of safety net, catching exercises of public power that do not qualify as administrative action.”<sup>55</sup> Legality thus allows for the judicial regulation of all forms of public action, whether it amounts to administrative action or not.<sup>56</sup>

In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*<sup>57</sup> the court held that the principle of legality generally established “that the exercise of public power is only legitimate where lawful.”<sup>58</sup> In subsequent judgements the courts have

<sup>52</sup> 1999 1 SA 374 (CC) at par 56 – 58.

<sup>53</sup> Hoexter (2004) 4 *Macquarie LJ* 165 at 181; Pillay (2005) 122 *SALJ* 419 at 421.

<sup>54</sup> *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 1 SA 374 (CC) at par 59. The court also held that the principle of legality applies to administrative action by means of the administrative justice rights in the Constitution.

<sup>55</sup> Hoexter (2004) 4 *Macquarie LJ* 165 at 183.

<sup>56</sup> *Minister of Correctional Services and Others v Kwakwa and Another* 2002 4 SA 455 (SCA) at par 35; *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) at par 148; *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 1 SA 374 (CC) at par 58.

<sup>57</sup> 1999 1 SA 374 (CC) at par 56.

<sup>58</sup> See also *Mgoqi v City of Cape Town and Another*; *City of Cape Town v Mgoqi and Another* 2006 4 SA 355 (C) at par 100; *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 3 SA 247 (CC) at par 49 – 50; *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 2 SA 311 (CC) at par 144; *Johannesburg Municipal Pension Fund and Others v City of Johannesburg and Others* 2005 6 SA 273 (W) at 287 – 288; *Minister of Home Affairs and Others v Watchenuka and Another* 2004 4 SA 326 (SCA) at par 19 – 20; *Gerber and Others v Member of the Executive Council for Development Planning and Local Government, Gauteng*,



extended the meaning of the principle to include further requirements of public conduct<sup>59</sup> such as to “act in good faith and ... not misconstrue the powers”<sup>60</sup> granted, that powers “should be exercised properly, ie on the basis of the true facts”<sup>61</sup> and that “the exercise of public power ... should not be arbitrary ... [and] must be rationally related to the purpose for which the power was given.”<sup>62</sup> When compared to the constitutional requirement that all administrative action must be lawful, reasonable and procedurally fair<sup>63</sup> it seems that the principle of legality practically brings about a parallel system of administrative law, but with a much wider scope of application.<sup>64</sup> It is only procedural fairness that has not yet been authoritatively recognised as part of the principle of legality, but such recognition is certainly not implausible.<sup>65</sup>

---

*and Another* 2003 2 SA 344 (SCA) at par 35; *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 3 SA 1151 (CC) at par 34 – 35.

<sup>59</sup> See Hoexter (2004) 4 *Macquarie LJ* 165 at 181 – 183.

<sup>60</sup> *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) at par 148. See also *Minister of Correctional Services and Others v Kwakwa and Another* 2002 4 SA 455 (SCA) at par 36.

<sup>61</sup> *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 6 SA 38 (SCA) at par 47.

<sup>62</sup> *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 2 SA 674 (CC) at par 85. See also *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 3 SA 247 (CC) at par 75.

<sup>63</sup> Constitution s 33(1).

<sup>64</sup> See Hoexter (2004) 4 *Macquarie LJ* 165 at 183 – 185. In *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 2 SA 311 (CC) at par 612, Sachs J described the principle of legality as sharing the “philosophy underlying” the administrative justice rights in s 33 of the Constitution.

<sup>65</sup> Hoexter (2004) 4 *Macquarie LJ* 165 at 184. Hoexter rightly argues that there is an easy link between the rule of law (as the foundation of the principle of legality) and the common law rules of natural justice, which capture much of the present notion of procedural fairness. In his minority judgement in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 2 SA 311 (CC) at par 616 – 630, Sachs J expressly recognised a procedural dimension to the principle of legality as applied to the making of subordinate legislation. He argued that the public duties “summed up in the notion of legality” required “that proper procedures are followed” and that “at the end of the day a reasonable opportunity is offered to members of the public

The wide ambit of the constitutional principle of legality, linked to the flexibility of that principle, allows ample scope for the application of a comprehensive public law approach to the judicial regulation of state commercial activity within the existing South African legal framework. The only remaining question is whether state commercial activity, or some forms thereof, is potentially excluded from the scope of the principle of legality because they arguably amount to the exercise of private power rather than public power. However, as I argued elsewhere,<sup>66</sup> and will develop further below,<sup>67</sup> an equation of state conduct of any nature with private conduct is untenable.<sup>68</sup> When the state acts it always does so with public power and its actions are always public action. The principle of legality thus always applies to the state. Furthermore, given the fundamental constitutional quality of the rule of law it is highly problematic and in Baxter's words "constitutionally unwise"<sup>69</sup> to suggest that some forms of state action can be excluded from the principle of legality.<sup>70</sup> Although the application of legality has been expressly

---

and all interested parties to know about the issues and to have an adequate say" similar to the requirements of procedural fairness in administrative law (under PAJA). At par 639 he declared: "The right to notice and public involvement arises under the principle of legality in a constitutional democracy."

<sup>66</sup> See chapter three at par 3.4 above.

<sup>67</sup> See par 3 below.

<sup>68</sup> Baxter *Administrative Law* 396 captures this well when he states: "It is unrealistic and constitutionally unwise to suggest that public authorities ... can ever act as private individuals in the modern world " (footnote omitted).

<sup>69</sup> Baxter *Administrative Law* 396.

<sup>70</sup> In *Gerber and Others v Member of the Executive Council for Development Planning and Local Government, Gauteng, and Another* 2003 2 SA 344 (SCA) the following remark of Navsa JA at par 37 seems to suggest that all action, perhaps even of a private nature, is subject to the principle of legality: "All, especially institutions of State, must respect the principle of legality." Cora Hoexter makes a similar point when she argues that we need the generality of the rule of law (and the principle of legality) as long as there is a tendency to distinguish between private power and public power and until it is recognised that all power should be subject to the minimum requirements encapsulated in the principle of legality: Hoexter (2004) 4 *Macquarie LJ* 165 at 185.

linked to exercises of *public power* in later cases,<sup>71</sup> the court in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*<sup>72</sup> originally envisaged its application more generally when it stated:

It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.

The judicial emergence of the principle of legality over the last decade furthermore indicates a particularly receptive climate in South African courts to an approach such as the comprehensive public law one discussed here.

### **3 Recognition of the added dimension to state commercial activity**

A theme that has emerged at various points in the previous chapters is the distinctive properties of state commercial activity setting it aside from equivalent private sector behaviour. In chapter three I argued that public interest is a pervasive element of all state action, whether commercial or not, distinguishing it from private action.<sup>73</sup> As a result I noted that public interest cannot function as a classification criterion to distinguish between different types of state action.<sup>74</sup> However, as I also noted, this does not mean that public interest is not an important consideration in fashioning effective regulation of state commercial activity. Its importance lies in the fact that it captures the added dimension to state commercial activity when compared to

---

<sup>71</sup> *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 3 SA 247 (CC) at par 49; *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 2 SA 311 (CC) at par 613; *Minister of Correctional Services and Others v Kwakwa and Another* 2002 4 SA 455 (SCA) at par 35 – 36; *Paola v Jeeva NO and Others* 2002 2 SA 391 (D) at 402; *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) at par 148; *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 2 SA 674 (CC) at par 85.

<sup>72</sup> 1999 1 SA 374 (CC) at par 58.

<sup>73</sup> See chapter three at par 3.4 above.

<sup>74</sup> See chapter three at par 3.4.4 above.

similar private conduct. The recognition of this added dimension is indeed one of the significant advantages of a public law approach.

### 3.1 Equating the state with private actors

With respect to commercial activity it has often been argued that the state is no different from other commercial players and should hence be treated in the same manner.<sup>75</sup> This equation of the state with private commercial actors naturally had a profound impact on the development of a regulatory approach to state commercial activity. It negated the need for any specific or special rules governing such activity.<sup>76</sup>

Although, as I argue below, the general equation of the state with private commercial players has been subjected to extensive criticism, aspects of such equation still linger in South African law. In a number of recent judgements comparisons between the regulatory treatment of private activity and state activity of similar nature seem to have impacted significantly on the formulation of the applicable rules. Two examples are the Supreme Court of Appeal judgements in *Cape Metropolitan Council v Metro Inspection Services*

---

<sup>75</sup> This argument is presented in various degrees of generality. See chapter four at par 2.2.4.1 above and *Mustapha and Another v Receiver, Lichtenburgh and Others* 1958 3 SA 343 (A) at 356 – 359; *Scholtz v Cape Divisional Council* 1987 1 SA 68 (C) at 73 – 74; *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC 2001 3 SA 1013 (SCA) at par 18; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) at par 12, 33, 45; Wiechers *Administratiefreg* 51, 91, 131; Baxter *Administrative Law* 62, 396; Oliver in Taggart (ed) *The Province of Administrative Law* 227 – 228; Burns & Beukes *Administrative Law under the 1996 Constitution* 100, 167 – 173; Hoexter (2004) 121 SALJ 595 at 599 – 604; Pretorius (2002) 119 SALJ 374 at 387; Arrowsmith (1990) 106 LQR 277; Woolf 1986 *Public Law* 220 at 223; Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* 140 – 149; Daintith (1979) 32 *Current Legal Problems* 41 at 42, 58 – 59.

<sup>76</sup> This notion was certainly strongly influenced by Dicey's views of the rule of law, which held that the state should be subject to the "ordinary law" like all other legal subjects and not receive special treatment. See Arrowsmith (1990) 106 LQR 277; De Ville *Judicial Review of Administrative Action in South Africa* 6 – 7.

(*Western Cape*) CC<sup>77</sup> and *Steenkamp NO v Provincial Tender Board, Eastern Cape*.<sup>78</sup> In the former case Streicher JA placed much emphasis on the fact that the relevant organ of state could be equated with any other private commercial actor when it cancelled the contract under scrutiny.<sup>79</sup> As a consequence the judge concluded that such action of the organ of state could not be said to amount to administrative action and public law rules did not apply.<sup>80</sup> In *Steenkamp NO v Provincial Tender Board, Eastern Cape*,<sup>81</sup> Harms JA also made much of the fact that the tender board was in no different position than a comparable private actor in its relationship with the private counterparty.<sup>82</sup> Looking at the matter from a slightly different angle than Streicher JA in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC*,<sup>83</sup> Harms JA ruled that he could see no reason why the private counterparty should be treated differently under a public tender than

---

<sup>77</sup> 2001 3 SA 1013 (SCA). For a detailed discussion of the facts of this case, see chapter three at par 3.2.4 above.

<sup>78</sup> 2006 3 SA 151 (SCA). For a detailed discussion of the facts of this case, see chapter four at par 2.4.5 above.

<sup>79</sup> *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 3 SA 1013 (SCA) at par 18: "When it purported to cancel the contract it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the *consensus* of the parties in respect of a commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power. Section 33 of the Constitution is concerned with the public administration acting as an administrative authority exercising public powers, not with the public administration acting as a contracting party from a position no different from what it would have been in had it been a private individual or institution."

<sup>80</sup> *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 3 SA 1013 (SCA) at par 18. Although, as I argue below, the judgement in *Logbro Properties CC v Beddersen NO* 2003 2 SA 460 (SCA) virtually reversed the effect of the *Cape Metropolitan Council* case, it did not reject the notion (at least in theory) that the state could be equated with private actors and that such factual equation could make a fundamental difference in the rules to be applied.

<sup>81</sup> 2006 3 SA 151 (SCA).

<sup>82</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) at par 12, 33, 45.

<sup>83</sup> 2001 3 SA 1013 (SCA).

under an analogous private tender.<sup>84</sup> For the purpose of determining the rules regarding delictual liability arising from tender processes the organ of state is hence equated with an analogous private party calling for tenders.

### 3.2 Recognising the added dimension

Over the last three decades academics and judges alike have increasingly questioned the equation of state activity with private conduct for the purpose of fashioning regulatory responses.<sup>85</sup> This questioning has mostly taken the form of recognition of an added dimension to state conduct absent from the private equivalent.

#### 3.2.1 Tender cases

A good illustration of the growing recognition of the added dimension to state commercial activity is the line of tender cases decided over the last decade. The traditional equation of state tender processes with those of private commercial players<sup>86</sup> has been systematically eroded to the point where such

---

<sup>84</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) at par 45.

<sup>85</sup> See Seddon *Government Contracts* 1, 8 – 9; Baxter *Administrative Law* 62, 99, 351 – 352, 396; Oliver in Taggart (ed) *The Province of Administrative Law* 228 – 230; Mullan in Taggart (ed) *The Province of Administrative Law* 243; Plasket in Glover (ed) *Essays in Honour of AJ Kerr* 160; Cockrell in Bennett *et al* (eds) *Administrative Law Reform* 235 – 238; Wiechers in Bennett *et al* (eds) *Administrative Law Reform* 258 – 260; Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* 141 – 149; Arrowsmith (1990) 106 LQR 277; Alder (1993) 13 *Legal Studies* 183 at 191; Ehlers *Verwaltung in Privatrechtsform* 225 *et seq*; *R v Somerset County Council, ex parte Fewings and others* [1995] 1 All ER 513 at 524; *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Other* 2006 2 All SA 175 (E) at par 56.

<sup>86</sup> Such equation is evident in cases such as *Bergl v Colonial Government* (1906) 23 SC 112; *Soeker v Colonial Government* (1906-1909) 3 Buch AC 207; *Mcilrath v Pretoria Municipality* 1912 TPD 1027; *Minister of Mines v McClelland* 1912 OPD 109; *Treadwell v Roberts* 1913 WLD 54 at 58; *Union Government (Minister of Railways and Harbours) v Faux Ltd* 1916 AD 105 (but cf Solomon JA's remarks at 114 – 115 indicating a measure of recognition that special considerations may apply because of state involvement); *Union Government v Vianini Ferroconcrete Pipes Ltd* 1938 AD 560; *Wentzel v Gemeenskapsontwikkelingsraad en Andere* 1981 (3) SA 703 (T) at 707 – 709; *G&L Builders CC v McCarthy Contractors (Pty) Ltd* 1988

state conduct is now practically always subject to public law judicial regulation.<sup>87</sup> Since constitutionalisation a significant number of judgements have ruled that the adjudication of state tenders are subject to public law regulation<sup>88</sup> and in a number of these the courts expressly rejected arguments attempting to equate organs of state with private commercial enterprises.<sup>89</sup> However, the recognition of the added dimension in public tender cases has mostly been limited to the adjudication of tenders and has generally not been

---

(2) SA 243 (SE) and the surprisingly recent judgement in *Coolcat Restaurante BK h/a Die Kafeteria, UOVS v Vrystaatse Regering en Andere* 1999 2 SA 635 (O) at 642, 645. See also Pretorius (2002) 119 SALJ 374 at 392.

<sup>87</sup> It should be noted that it has long been accepted that the adjudication of tenders by municipal councils are subject to public law regulation because of the specific legislative duties resting on such councils with regard to public tenders. See *Hopf v Pretoria City Council* 1947 2 SA 752 (T) and *K & P Contractors v Standerton Town Council and Another* 1963 1 SA 405 (T).

<sup>88</sup> *Claude Neon Ltd v Germiston City Council and Another* 1995 3 SA 710 (W); *GNH Office Automation CC and Another v Provincial Tender Board and Others* 1996 9 BCLR 1144 (Tk); *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere* 1997 2 All SA 548 (SCA); *Aquafund (Pty) Ltd v Premier of the Province of the Western Cape* 1997 7 BCLR 907 (C); *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd* 1998 2 SA 109 (W); *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others* 1999 1 SA 324 (CkH); *National & Overseas Modular Construction (Pty) Ltd v Tender Board, Free State Provincial Government, and Another* 1999 1 SA 701 (O); *Premier, Free State, and Others v Firechem Free State (Pty) Ltd* 2000 4 SA 413 (SCA); *Nextcom (Pty) Ltd v Funde NO and Others* 2000 4 SA 491 (T); *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA); *Olitzki Property Holdings v State Tender Board and Another* 2001 3 SA 1247 (SCA); *Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd* 2001 4 SA 142 (SCA); *SA Post Office Ltd v Chairperson of Western Cape Provincial Tender Board and Others* 2001 5 BCLR 500 (C); *Grinaker LTA Limited & Another v Tender Board (Mpumalanga) & Others* 2002 3 All SA 336 (T); *Du Bois v Stompdrift-Kamanassie Besproeiingsraad* 2002 5 SA 186 (C); *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA); *Metro Projects CC and Another v Klerksdorp Local Municipality and Others* 2004 1 SA 16 (SCA); *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA); *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC).

<sup>89</sup> *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd* 1998 2 SA 109 (W) at par 14, 16.1; *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) per Olivier JA at par 18, 26, 32, 38 – 39 and per Schutz JA (for the court) at par 7 – 9; *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) at par 5 – 7.

extended to the resultant conclusion of the state contract.<sup>90</sup> Only in a limited number of cases were the courts prepared to also recognise the added dimension in the conclusion of state contracts<sup>91</sup> and in even fewer instances in conduct under such contract, including cancellation.<sup>92</sup> There seems to be a persistent notion that in the latter two categories of conduct the state can be equated with private commercial parties.<sup>93</sup> However, recognition of the factors constituting an added dimension to the state commercial activity under scrutiny in *Logbro Properties CC v Bedderson NO*<sup>94</sup> and *Steenkamp NO v Provincial Tender Board, Eastern Cape*<sup>95</sup> had the effect of virtually applying public law regulation to all instances of such activity. In the former case the Supreme Court of Appeal pointed to the use of superior power by the organ of state when setting the terms of the contract,<sup>96</sup> in the latter case the Constitutional Court highlighted the statutory sources of the state's procurement powers as constituting an added dimension.<sup>97</sup> The state will in

<sup>90</sup> See *Umfoloji Transport (Edms) Bpk v Minister van Vervoer en Andere* 1997 2 All SA 548 (SCA) at 552 – 553; *Aquafund (Pty) Ltd v Premier of the Province of the Western Cape* 1997 7 BCLR 907 (C) at 914 – 915; *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 3 SA 1013 (SCA) at par 19; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) at par 12.

<sup>91</sup> See the remarks in *Claude Neon Ltd v Germiston City Council and Another* 1995 3 SA 710 (W) at 719: “[T]he decision of the first respondent to award the second respondent the tender qualifies... 'as a subject for judicial review'”; *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) per Olivier JA at par 25 – 39, but of the more restricted approach of the majority per Schutz JA at par 9: “I am of the view that the actions of Transnet in calling for and adjudicating tenders constituted administrative action, whatever contractual arrangements may have been attendant upon it”; *Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd* 2001 4 SA 142 (SCA); *Grinaker LTA Limited & Another v Tender Board (Mpumalanga) & Others* 2002 3 All SA 336 (T) at par 32: “It is common cause that the award of a tender is an administrative decision” and par 70; *Metro Projects CC and Another v Klerksdorp Local Municipality and Others* 2004 1 SA 16 (SCA) at par 12.

<sup>92</sup> *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) at par 10 – 11.

<sup>93</sup> See Bolton *The Law of Government Procurement in South Africa* 28 *et seq.*, 343 *et seq.*

<sup>94</sup> 2003 2 SA 460 (SCA).

<sup>95</sup> 2007 3 SA 121 (CC).

<sup>96</sup> *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) at par 11.

<sup>97</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 20 – 21.



most (if not all) cases of tendering determine the terms of the proposed contract unilaterally<sup>98</sup> and at least the constitutional foundation of the powers thus exercised will likewise always be present. It follows that an added dimension will always exist in state tendering when compared to private tendering.

### **3.2.2 Factors of an added dimension**

As noted in the tender cases, the added dimension has been recognised in various factors, which activate public law regulation of the particular state conduct where the relevant factor is found to exist. It is recognition of this added dimension that lies at the heart of the current classification approach of the South African courts, discussed in chapter three. However, as I argued in chapter three, the classification approach is doomed to failure *inter alia* because it is impossible to draw a line between instances of state action where most of these factors are present and those where such factors are supposedly absent. Most of these factors are always present in state activity. Recognition of these factors thus establishes that there is a definitive added dimension to state action setting it aside from private conduct. The critical difference between the classification approach and the comprehensive public law approach discussed here is that the latter takes the permanent presence of the added dimension as its point of departure. It focuses the regulatory attention on this added dimension. In this way the courts can engage in the substantive regulatory concerns emerging from state commercial activity and focus on formulating appropriate regulatory responses to these substantive issues. This is a superior approach to the classification one since courts do not get bogged down in sterile threshold questions regarding what set of regulations to apply.<sup>99</sup>

---

<sup>98</sup> See the remarks of Langa CJ and O'Regan J in their dissenting judgement in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 89 regarding the way in which government contracts are probably mostly concluded.

<sup>99</sup> See also Arrowsmith (1990) 106 LQR 277 at 291 – 292; Hoexter (2004) 121 SALJ 595 at 614 – 618.

### 3.3 Nature and content of the added dimension

The content and nature of the added dimension to state commercial activity also seem to favour a comprehensive public law approach. Generally and at the broadest level the added dimension to state commercial activity can be said to reside in the public interest requirement underlying all state conduct.<sup>100</sup> More specifically, general public interest in state commercial activity manifests in the spending of public money, the furtherance of public goals and the legitimacy of the interests pursued by the state. Further components of the added dimension are the limited nature of the state's capacity,<sup>101</sup> its unique legal personality<sup>102</sup> and the constitutional duties resting on the state. Public law rules are without a doubt pre-eminently focused on regulating these specific issues.<sup>103</sup>

The comprehensive public law approach advanced here does not, however, simply view state commercial activity as public action and hence subject to public law regulation. It acknowledges that state commercial activity retains its inherent "private" or commercial nature, but with an added dimension. The factors setting the relevant state action aside from analogous private conduct constitute an added dimension in the sense that the state version of this activity is something more than comparable private conduct. It does not necessarily result in the nature of the action being different – the nature may in fact be exactly the same, for example concluding a contract, but because of this additional dimension the regulation must be different. The regulation must also amount to something more than is the case with

---

<sup>100</sup> But cf *Marais v Democratic Alliance* 2002 2 BCLR 171 (C) where it is suggested that the mere existence of public interest in a particular act is not adequate to subject such action to administrative law control. See also Currie & De Waal *The Bill of Rights Handbook* 659.

<sup>101</sup> See chapter two at par 3 above for a detailed discussion of the state's commercial capacity.

<sup>102</sup> On the commercial peculiarities of the state's legal personality see further chapter four at par 2.2.4.1 above.

<sup>103</sup> See Woolf 1986 *Public Law* 220 at 221 who argues: "The critical distinction [between public law and private law] arises out of the fact that it is the public as a whole ... who are the beneficiaries of what is protected by public law and it is the individuals or bodies entitled to the rights who are the beneficiaries of the protection provided by private law."

corresponding private conduct and it is exactly for this something more that the public law rules cater.

The fact that regulation in terms of a comprehensive public law approach amounts to something more than is the case with comparable private conduct does not mean that such regulation is necessarily more onerous. It simply means that additional rules apply. Those additional rules may in fact provide the state with more freedom than its comparable private counterpart.<sup>104</sup> When I am talking about more regulation I am only referring to the body of rules applicable to the regulated activity and not the content or ambit of those rules. Whether a comprehensive public law approach places a higher burden on the state is discussed in detail below in the context of administrative efficiency.<sup>105</sup>

Finally, a comprehensive public law approach holds an advantage over an exclusively private law approach in the mandatory nature of the public law rules applied by the former. Although private law rules *can* probably also focus regulatory attention on the factors constituting the added dimension to state commercial activity,<sup>106</sup> those rules are mostly subject to exclusion and/or modification by the parties to the transaction. This freedom on the part of the regulated parties may fundamentally undermine the influence of the courts as regulator in a private law approach. The public law rules applied in terms of a comprehensive public law approach, in contrast, cannot easily be derogated by the regulated parties, with the result that courts can take a much firmer stance in relation to the factors calling for increased regulation. The comprehensive public law approach therefore sends out a clear message that the factors constituting the added dimension are always present in state commercial activity and always deserve regulatory attention. Such an approach leaves little (if any) room for important public considerations to be

---

<sup>104</sup> Eg the rule against the fettering of executive discretion may create the possibility for the state to escape contractual liability far easier than would be the case for a comparable private party. See note 207 below for more on this rule.

<sup>105</sup> See par 5 below.

<sup>106</sup> See generally the arguments presented in this respect in chapter four above.

swept under the carpet. The resultant enhancement of transparency as an important constitutional imperative<sup>107</sup> is clear.

#### **4 Advancing a culture of justification and transformative constitutionalism**

In the conclusion to chapter three<sup>108</sup> I argued that the current classification approach to the judicial regulation of state commercial activity is out of step with the Constitution's vision of the new democratic South African state. A comprehensive public law approach is much closer aligned to the constitutional vision captured by Karl Klare's "transformative constitutionalism"<sup>109</sup> and Etienne Mureinik's "culture of justification".<sup>110</sup> Klare describes "transformative constitutionalism" as central to the Constitution:

[A] long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law ... In the background is an idea of a highly egalitarian, caring, multicultural community, governed through participatory, democratic processes in both the polity and large portions of what we now call the 'private sphere.'<sup>111</sup>

---

<sup>107</sup> See s 1, 195 and 217 of the Constitution.

<sup>108</sup> See chapter three at par 5 above.

<sup>109</sup> Klare (1998) 14 *SAJHR* 146.

<sup>110</sup> Mureinik (1994) 10 *SAJHR* 31. See also Mureinik in Bennett *et al* (eds) *Administrative Law Reform* 35; Dyzenhaus (1998) 14 *SAJHR* 11.

<sup>111</sup> Klare (1998) 14 *SAJHR* 146 at 150. See also chapter three at par 5 above for a more detailed discussion of Klare's arguments.

Along similar lines Etienne Mureinik describes the Constitution as a bridge to “a culture of justification.”<sup>112</sup> Such culture he defines as one

in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion not coercion.<sup>113</sup>

These notions of the type of democratic state ushered in by constitutionalisation in South Africa are critical to an analysis of what an appropriate approach, in administrative law or generally, to the regulation of any state conduct may be.<sup>114</sup> The comprehensive public law approach is superior when compared to the approaches discussed in the previous two chapters in the way in which it ties in with the Constitution’s vision of the state and power in society and the progression across the bridge from the old apartheid state to this new “culture of justification”.<sup>115</sup>

---

<sup>112</sup> Mureinik (1994) 10 *SAJHR* 31 at 32.

<sup>113</sup> Mureinik (1994) 10 *SAJHR* 31 at 32.

<sup>114</sup> Harlow & Rawlings *Law and Administration* 1 notably capture this premise with their statement: “Behind every theory of administrative law there lies a theory of the state.” See also Craig *Administrative Law* 1; Corder (1998) 14 *SAJHR* 38 at 40 – 41, but of the more restricted role ascribed to political theory by Wade & Forsyth *Administrative Law* 8 – 9.

<sup>115</sup> A number of scholars have noted that the Constitution’s vision of transformation is perhaps not best described by the traditional bridge metaphor, which reduces the process to a single linear progression from one static point to another. As Van der Walt (2001) 118 *SALJ* 258 at 296 states: “In this vision of transformation there is no longer room for imagining that things could be different, that there might be further options and more complex alternatives to the two places between which we have chosen to choose”. See also Botha 2003 *TSAR* 20 at 35; Langa (2006) 17 *Stell LR* 351 at 353 – 354. These commentators argue that transformative constitutionalism should rather be seen as a process of constant change, that “it envisions a society that will always be open to change and contestation, a society that will always be defined by transformation”: Langa (2006) 17 *Stell LR* 351 at 354. Constitutional values such as openness and participation, captured in the broader public law principles of the rule of law and legality as well as in the administrative justice rights, are important ingredients in this process “to promote and sustain transformation itself”: Langa (2006) 17 *Stell LR* 351 at 354. This view corresponds with Davis’s description of democracy and the consequent importance of administrative law rules in achieving that vision: “Once democracy is seen as a system for

#### 4.1 Transparency, accountability and participation

Central to the culture of justification and the project of transformative constitutionalism are the values of transparency, accountability and participation, which appear throughout the Constitution.<sup>116</sup> Corder captures this well when he states:

The core values of this approach to democracy and the functioning of the state are openness of action, participation in decision making, justification for decisions made, and accountability for administrative action.<sup>117</sup>

It is these values that are first and foremost served by the comprehensive public law approach in contrast to the classification approach and exclusively private law approach to the regulation of state commercial activity.

In relation to the regulated conduct it is only the comprehensive public law approach that demands consistent adherence to the values of transparency, accountability and participation. Put differently, only the comprehensive public law approach allows courts to test all state commercial activity against these values.<sup>118</sup> The other two approaches, in particular the

---

maximizing the range of debates and deliberations about social, political and indeed moral questions ... traditional administrative law principles can assist to promote a more inclusive debate, a wider social conversation as to the nature and structure of society": Davis in Bennett *et al* (eds) *Administrative Law Reform* 26. Corder (1998) 14 *SAJHR* 38 at 41 echoes this view when he states: "The importance of the constitutional requirements of lawfulness, procedural fairness, reason-giving and justification for administrative action to such a conception of democracy is self-evident."

<sup>116</sup> Constitution s 1, 36, 41, 57, 59, 70, 72, 92, 116, 118, 154, 160, 195, 217. See also *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 2 SA 311 (CC) at par 110 – 113, 621 – 625; *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 2 SA 359 (CC) at par 73 – 83.

<sup>117</sup> Corder (1998) 14 *SAJHR* 38 at 41.

<sup>118</sup> Davis in Bennett *et al* (eds) *Administrative Law Reform* 27 states along similar lines: "Review can hold an agency accountable to the entrenched values the constitution enshrines as essential to the democratic enterprise, and can constrain the agency to justify its

exclusively private law approach, allow significant portions of state conduct, specifically of a commercial nature, to escape such scrutiny. Such partial application of the founding constitutional values by the courts as the guardians of the Constitution<sup>119</sup> is not reconcilable with a culture of justification and transformative constitutionalism. It would amount to the intolerable continuation of at least one sphere where state action is shielded from public scrutiny and where the cloak of secrecy characteristic of the apartheid era remains wrapped around unaccountable exercises of administrative discretion.<sup>120</sup> By insisting that rules of public law, in the very least the principle of legality, apply to all instances of state conduct, the comprehensive public law approach averts such a continuation of a culture of authority<sup>121</sup> and hence advances the project of transformative constitutionalism.

The wide scope of regulation under the comprehensive public law approach also supports the values enshrined in the Constitution, rendering that approach much closer aligned to the model society articulated in the Constitution than its rivals. Sachs J captured something of this advantage of the comprehensive public law approach when he said in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)*:<sup>122</sup>

Because transparency and responsiveness relate more to the broad character of the workings of our democracy than to doing justice to an individual, all interested parties ... are entitled to

---

performance not only in terms of the powers granted to it but also in terms of its ostensible contribution to the attainment of the sort of society the bill of rights envisages.”

<sup>119</sup> See Constitution s 167, 172; Davis in Bennett *et al* (eds) *Administrative Law Reform* 27.

<sup>120</sup> See Corder (1998) 14 *SAJHR* 38 at 43. Anne Davies captures a similar sentiment in English law when she states in support of her argument for increased (public) law regulation of state contracting: “A tighter legal regime cannot address many of the political objections to contractualisation. But the law could do much more to ensure that contracts are not simply an area of unaccountable discretionary power for the government”: Davies in Freedland & Auby (eds) *The Public Law/Private Law Divide* 129.

<sup>121</sup> See Mureinik (1994) 10 *SAJHR* 31 at 32.

<sup>122</sup> 2006 2 SA 311 (CC) at par 627.

know what government is doing, and, as concerned citizens, to have an appropriate say.

The much narrower ambit of regulation under the exclusively private law approach<sup>123</sup> and even the classification approach denies large sections of society such participation in state commercial activity.

In relation to the courts as regulators the comprehensive public law approach also reinforces the culture of justification and transformative constitutionalism by instilling transparency, accountability and participation in the judicial process of regulating state commercial activity. In this regard the Chief Justice recently noted:

Under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values. This approach to adjudication requires an acceptance of the politics of law. There is no longer place for assertions that the law can be kept isolated from politics.<sup>124</sup>

The comprehensive public law approach allows judges to regulate state commercial activity with direct reference to foundational constitutional values. Under this approach there is no room or need for judges to mask the true reasons for their decisions in hollow conceptual reasoning as in the classification approach or to deny the public interest and political dimension of both the regulated activity and their regulatory involvement therein such as in the exclusively private law approach. By locating the judicial regulation of state commercial activity categorically within a public law framework, especially in an administrative law one, highly political questions such as the relationship between the courts and executive are forced to the fore.<sup>125</sup> In the process the artificial barrier between law and politics is undermined and the

---

<sup>123</sup> That is both in respect of the much narrower view of the interests involved in a private law perspective and the much narrower standing regime created by the doctrine of privity, see chapter four at par 5 above.

<sup>124</sup> Langa (2006) 17 *Stell LR* 351 at 353. See also Klare (1998) 14 *SAJHR* 146 at 150, 156 *et seq*; Hoexter (2000) 117 *SALJ* 484 at 500.

<sup>125</sup> See Corder (1998) 14 *SAJHR* 38 at 41.



courts can be held accountable for their direct political role in state administration and particularly state commercial activity. This is exactly the kind of “politically and morally engaged” method of adjudication that the Constitution demands.<sup>126</sup>

The administrative justice rights guaranteed in section 33 of the Constitution along with foundational public law values such as openness, accountability, participation and those captured by the rule of law encapsulate the type of society we wish to live in and the role of the courts is to protect that constitutional vision of the state.<sup>127</sup> The comprehensive public law approach hence supports the culture of justification and transformative constitutionalism, because by applying these public law rules to all instances of state (commercial) activity it demands the permanent public justification of all state conduct, of all exercises of power, in terms of the Constitution’s vision of society.<sup>128</sup>

## 4.2 Beyond a culture of justification

Johan van der Walt & Henk Botha have developed Mureinik’s theory of a culture of justification further in a manner that underscores the importance of a comprehensive public law approach to the judicial regulation of state commercial activity at an even more fundamental level.<sup>129</sup> In arguing for a reading of the Constitution that enhances the possibility of community<sup>130</sup> in

---

<sup>126</sup> See Klare (1998) 14 *SAJHR* 146 at 150 (describing transformative constitutionalism as “a method of adjudication that is politically and morally engaged”), 156 *et seq.*

<sup>127</sup> Davis in Bennett *et al* (eds) *Administrative Law Reform* 27.

<sup>128</sup> See Davis in Bennett *et al* (eds) *Administrative Law Reform* 25: “The task of a modern system of administrative law is ... to strengthen a popular form of accountability, and thereby to ensure greater public participation and control over the exercise of public power”, 27 (quoted in note 118 above).

<sup>129</sup> Van der Walt & Botha (2000) 7 *Constellations* 341.

<sup>130</sup> Van der Walt & Botha think of community “in terms of a politics of friendship” that constitutes “communities without community”: (2000) 7 *Constellations* 341 at 351. They argue (at 352) that “[t]he last chance for community is in fact also its first chance. The recognition of the legitimate will of the other in the face of social conflict is a prerequisite for community if *community* is to be understood as a *relation with* someone other than the self.”

South Africa,<sup>131</sup> they define justification to mean: “The unjust sacrifice of a social interest in the pursuit of a social goal.”<sup>132</sup> They link this view of community to Mureinik’s culture of justification based on administrative justice principles, stating:

The principles of administrative “justice” which underlie Mureinik’s understanding of our new constitutional dispensation in terms of a culture of justification implicitly acknowledge that justification consists in the sacrificial provision of unjust grounds. Administrative justice most often comes to turn on the demand that the pursuit of an administrative goal does not infringe upon the rights of individuals more than is absolutely necessary. The limitation of infringement that this principle demands acknowledges that we are inflicting harm in the pursuit of social goals.<sup>133</sup>

The comprehensive public law approach maintains the acknowledgement of harm, or sacrifice, in instances of state commercial activity where the other approaches discussed thus far deny it. The classification approach discussed in chapter three can be understood in terms of Van der Walt & Botha’s first reading of the harm inflicted “in the pursuit of social goals.”<sup>134</sup> When a court concludes that public law rules do not apply and judicial review is hence not available in a given case of state commercial activity, “[i]t imparts the message that the demand of the plaintiff is fundamentally mistaken and does

---

The essence of their view of community lies in the acceptance of social dissent, which entails acknowledgement of the legitimacy of the other’s view, even where that view is not tolerated or accommodated. Only such a view, they argue, is reconcilable with the fundamental plurality and social complexity of political life. The steadfast recognition of the legitimacy of the other’s will implies that state decisions, whether legislative, executive or judicial, amount to choices to prefer one legitimate view over another. Consequently, the trumped view, by being legitimate but denied, emerges as a sacrifice or a harm suffered in achieving the prevailing view.

<sup>131</sup> See also Botha 2003 *TSAR* 20.

<sup>132</sup> Van der Walt & Botha (2000) 7 *Constellations* 341 at 352.

<sup>133</sup> Van der Walt & Botha (2000) 7 *Constellations* 341 at 353.

<sup>134</sup> Van der Walt & Botha (2000) 7 *Constellations* 341 at 353.

not really deserve the hearing it has received.”<sup>135</sup> The exclusively private law approach discussed in chapter four denies the other in an even more fundamental manner by denying the very existence of the harm inflicted. By insisting on the justification of state commercial conduct with reference to consensus, that is in an exclusively private law manner, the exclusively private law approach “denies the need for and the reality of sacrifice.”<sup>136</sup> Both these approaches thus reject, in varying degrees, the legitimate will of the other and subsequently close the door to real community.

The comprehensive public law approach, on other hand, acknowledges that the social aim at stake is unjust in the face of the harm it causes to the plaintiff. It recognises the necessity to engage in the question “whether the unjust aim can be justified.”<sup>137</sup> It takes the “infringed interests of the plaintiff seriously” and essentially does not close off the debate, thereby denying the sacrifice or harm caused, as the other approaches do.<sup>138</sup> This advantage of the comprehensive public law approach is achieved by insisting on the application of administrative justice principles in all instances of state conduct, including state commercial activity. These principles “admit to the inevitability of sacrifices in the ... executive pursuit of social goals ... [but] require that such sacrifices remain as few and as small as possible.”<sup>139</sup> A clear example is the application of the proportionality requirement in the justification of state conduct either via the section 33 right to reasonable administrative action<sup>140</sup> or

---

<sup>135</sup> Van der Walt & Botha (2000) 7 *Constellations* 341 at 353.

<sup>136</sup> Van der Walt & Botha (2000) 7 *Constellations* 341 at 355.

<sup>137</sup> Van der Walt & Botha (2000) 7 *Constellations* 341 at 353.

<sup>138</sup> See also Botha 2003 *TSAR* 20 at 24 – 25, where he notes a similar advantage in the metaphor of rights as dialogue that can be closely aligned to the comprehensive public law approach.

<sup>139</sup> Van der Walt & Botha (2000) 7 *Constellations* 341 at 355, 353: “We believe that the admission of harm done, evident in the procedural demand that we pursue social goals in the least harmful way possible, commits one to this understanding of judicial review.”

<sup>140</sup> See Hoexter *Administrative Law in South Africa* 309; De Ville *Judicial Review of Administrative Action in South Africa* 211 – 216; Pillay (2005) 122 *SALJ* 419 at 426 – 429 for the argument that proportionality forms part of the reasonableness test under s 33(1) of the Constitution.

as a more general constitutional principle.<sup>141</sup> By insisting on higher levels of participation and debate on the legitimacy of state activity, the comprehensive public law approach endorses

a relational, dialogic conception of rights [which] recognise[s] that there are different ways of looking at the world; that legal distinctions do not reflect pre-existing boundaries, but depend on the perspective of those making them; that the idea of justice that is blind and therefore neutral with regard to competing conceptions of the good invariably privileges certain ways of seeing over others.<sup>142</sup>

Van der Walt and Botha argue that their view of a culture of justification calls for a method of constitutional adjudication that “instead of *defining* the rights entrenched in the Bill of Rights in an abstract way ... would *delimit* these rights with reference to the exigencies of a particular socio-economic context.”<sup>143</sup> The same argument can be made with reference to the judicial approach to the regulation of state commercial activity where the comprehensive public law approach constitutes such a method of adjudication. Rather than pre-determining the substantive entitlements of the parties, in particular of the individual plaintiff, in a sterile, conceptual and highly abstract manner as the classification and exclusively private law approaches do, the comprehensive public law approach allows for justification analysis in a highly context sensitive manner. The public law rules applied in this approach, especially the administrative justice principles of reasonableness and procedural fairness, are highly flexible in content in relation to the “particular socio-economic context” in which they apply.<sup>144</sup>

---

<sup>141</sup> Arguably as part of the rule of law: De Ville (1994) 9 *SAPR/PL* 360; Schwarze *European Administrative Law* 712 – 714. See also *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 3 SA 1151 (CC) at par 101: “[P]roportionality, which is inherent in the Bill of Rights, is relevant to determining what fairness requires.”

<sup>142</sup> Botha 2003 *TSAR* 20 at 25.

<sup>143</sup> Van der Walt & Botha (2000) 7 *Constellations* 341 at 355.

<sup>144</sup> See *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 2 SA 311 (CC) at par 145;

### 4.3 Regulating private power

The culture of justification and transformative constitutionalism championed by the Constitution extends beyond mere state action. It envisages a society where all exercises of power are “expected to be justified,”<sup>145</sup> a “highly egalitarian, caring”<sup>146</sup> community “built on persuasion, not coercion.”<sup>147</sup> In arguing for the “vision of collective self-determination” found in the Constitution Klare powerfully states:

[T]he South African Constitution embodies the idea that the power of the community can (and must) be deployed to achieve goals consistent with freedom, that collective power can be tapped to create social circumstances that will nurture and encourage people’s capacity for self-determination.<sup>148</sup>

The Constitution’s vision of a new South African society cannot be achieved simply by transforming state conduct and without a radical transformation of private ordering within society.<sup>149</sup> In this aspect of the transformative constitutionalism project a comprehensive public law approach to the regulation of state commercial activity can play a critical role. Put differently, the comprehensive public law approach can be a useful vehicle for courts to start infusing private power relationships with higher levels of transparency,

---

*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 4 SA 490 (CC) at par 45; *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 3 SA 1151 (CC) at par 101; *Permanent Secretary, Department of Education and Welfare, Eastern Cape, and Another v Ed-U-College (PE) (Section 21) Inc* 2001 2 SA 1 (CC) at par 19, 22; PAJA s 3(2)(a); *De Ville Judicial Review of Administrative Action in South Africa* 211 *et seq*, 221. See also *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) at par 63.

<sup>145</sup> Mureinik (1994) 10 SAJHR 31 at 32.

<sup>146</sup> Klare (1998) 14 SAJHR 146 at 150.

<sup>147</sup> Mureinik (1994) 10 SAJHR 31 at 32. See also Langa (2006) 17 Stell LR 351 at 352 – 353.

<sup>148</sup> Klare (1998) 14 SAJHR 146 at 153.

<sup>149</sup> See Davis in Bennett *et al* (eds) *Administrative Law Reform* 31 – 32; Van der Walt 2005 TSAR 655 at 661 – 667.

accountability and participation, that is to bring them in line with a constitutional vision of community.

The wide-ranging use of private law forms in executing state commercial activity creates a strong parallel between such state action and private (commercial) conduct. At the same time state commercial activity remains public in nature, which allows for the consistent application of public law rules under a comprehensive public law approach.<sup>150</sup> When these two aspects of the current approach are combined, a bridge is created between the traditional dichotomising legal analyses of private and public action. It allows for typically private law conceptualised commercial activity to be viewed within a public law regulatory framework. Once this regulatory model has been established in the context of state commercial activity it becomes much easier (and certainly less controversial) to export traditional public law duties to private relationships.<sup>151</sup> The regulation of state commercial activity under a comprehensive public law approach hence becomes the frontier for the dismantling of the distinction between private and public legal analysis and, more importantly, for subjecting private law doctrine to more stringent constitutional reassessment, which is critical to the success of transformative constitutionalism in South Africa.

#### **4.4 Administrative justice as an autonomous goal**

Finally, in the new constitutional dispensation administrative justice must be viewed as an autonomous goal and not simply in an instrumental way as collateral to the achievement of some other purpose. Section 33(1) of the Constitution makes this clear when it declares in simple terms: “Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.” By casting these rights in this form, the Constitution bolsters the

---

<sup>150</sup> See par 2 above.

<sup>151</sup> The comprehensive public law approach may also be quite helpful in this way to foster a theoretically move away from the paradigm view of contract as a monolithic notion aimed at commercial exchange between essentially two autonomous parties towards a more plural view that embraces differentiation between different contexts of contracting, even at the most fundamental doctrinal level.

foundational values captured by a culture of justification discussed above. While the section 33 rights may also serve collateral purposes, such as facilitating the protection of other fundamental rights or achieving protection of rights not expressly listed in the Constitution,<sup>152</sup> it is important to recognise the administrative justice rights as independent, free-standing elements of the constitutional vision of the South African society.<sup>153</sup> In *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)*<sup>154</sup> Sachs J expressed the importance of these rights as follows in the context of assessing whether the administrative justice rights or analogous principles under the broader notion of legality apply to the making of regulations:

The right to speak and be listened to is part of the right to be a citizen in the full sense of the word. In a constitutional democracy dialogue and the right to have a voice on public affairs is constitutive of dignity. Indeed, in a society like ours, where the majority were for centuries denied the right to influence those who ruled over them, the right 'to be present' when laws are being made has deep significance.<sup>155</sup>

The autonomous value of administrative justice exists not only in its procedural dimension, that is in the way in which it increases formal participation and transparency in exercises of power by guaranteeing a right to procedural fairness.<sup>156</sup> It also exists in lawfulness and particularly in

---

<sup>152</sup> See Van der Walt (2002) 13 *Stell LR* 206 at 206 – 222 for the use of the administrative law right to procedural fairness to protect socio-economic rights. For endorsements of such instrumental views of the procedural fairness rights see also *Janse van Rensburg NO and Another v Minister of Trade and Industry NO and Another NNO* 2000 1 SA 29 (CC) at par 24; *De Lange v Smuts NO and Others* 1998 3 SA 785 (CC) at par 131. See also De Ville *Judicial Review of Administrative Action in South Africa* 217.

<sup>153</sup> Marais JA's minority opinion in *Cooper NO v First National Bank of SA Ltd* 2001 3 SA 705 (SCA) must therefore be rejected where he states at par 42: "I do not see the principle of *audi* in administrative law as an end in itself, but as a means to an end."

<sup>154</sup> 2006 2 SA 311 (CC) at par 627.

<sup>155</sup> See also Allan (1998) 18 *OJLS* 497.

<sup>156</sup> The value of procedural fairness rights is, however, not limited to the way in which it increases formal participation in government processes. Put differently, that value does not

reasonableness review. It is in these latter two types of review that courts are empowered to engage the executive on a substantive level.<sup>157</sup> The resultant

---

reside only in providing the increased participation as a matter of fact. It extends to facilitate our understanding of rights. Botha 2003 *TSAR* 20 at 24 – 25 articulates the metaphor of rights as dialogue that is acutely appropriate in relation to the s 33 administrative justice rights and underlines the value of those rights. In these arguments Botha is also developing Mureinik's culture of justification further by showing the relevance for our understanding of rights of the dialogue established by the constitutional call for justification. In this regard Botha notes: "The rights as dialogue metaphor also emphasises the shifting nature of our understanding of rights. In terms of this metaphor, the content, reach and permissible limitations of rights are determined through an ongoing process of public dialogue. Current understandings of rights therefore remain open to critical inquiry and a process of dialogic modulation and re-interpretation. By conceiving rights as dialogue, we declare our readiness to listen to other viewpoints, to enter into discussion over our own beliefs, to open ourselves to the possibility of a dialogic modulation of deeply held convictions and prejudices. We commit ourselves to the idea of a public sphere that is characterised by openness, equality and plurality, and the transformation of institutions that do not fully embrace these values."

<sup>157</sup> See *Carephone (Pty) Ltd v Marcus NO and Others* 1999 3 SA 304 (LAC) at par 35 – 37: "When the [1993] Constitution requires administrative action to be justifiable in relation to the reasons given for it, it thus seeks to give expression to the fundamental values of accountability, responsiveness and openness ... In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' of the matter in some way or another"; *Van Zyl v New National Party and Others* 2003 3 All SA 737 (C) at par 50 – 51; Corder in Cheadle *et al* (eds) *South African Constitutional Law: The Bill of Rights* 27-16 – 27-19. However, in *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 3 SA 265 (CC) at par 88 Chaskalson CJ seems to deny much of this substantive engagement between courts and the executive as part of the Constitution's transformation objectives: "I do not consider that item 23(2)(b) of Schedule 6 [of the Constitution, retaining the 1993 Constitution's administrative justice provision as a transitional measure] has ... introduced substantive fairness into our law as a criterion for judging whether administrative action is valid or not. The setting of such a standard would drag Courts into matters which, according to the separation of powers, should be dealt with at a political or administrative level and not at a judicial level. This is of particular importance in cases such as the present, in which the issue relates to difficult and complex policies adopted in order to promote an equitable transformation of apartheid structures and a reversal of policies that were grossly unequal." Mokgoro J and Sachs J in their minority judgement in this case fundamentally disagreed with the Chief Justice, arguing at par 153: "The jurisprudence of transition is not unproblematic. This Court has emphasised the need to eradicate patterns of



counter-majoritarian problem<sup>158</sup> “opens up the possibility of social deliberation that would exceed technical procedure ... [that] gives politics a chance.”<sup>159</sup> In this manner administrative justice can be seen as one constitutional translation of the “source of energy during the struggle ... [of] the belief that things could be different, that protest action could articulate other options for meaningful change.”<sup>160</sup>

However, the approach of South African courts to the regulation of state commercial activity thus far has not supported the notion of administrative justice as an autonomous goal. The classification approach represents a

---

racial discrimination and to address the consequences of past discrimination which persist in our society. This relates to substantive fairness, which focuses on the effect or impact of government action on people. This Court has also emphasised the obligation upon the government to exhibit procedural fairness in decision-making. A characteristic of our transition has been the common understanding that both need to be honoured. The present case highlights a particular aspect of that complex process, in which a Court may be called upon to examine both the procedural fairness of the decision and substantive fairness, or fairness of the effect or impact, and in that examination these two aspects may to some extent become intertwined. It is necessary to determine the circumstances in which a Court, looking at a scheme that as a whole passes the test of constitutional fairness, can and should detach a detail which, viewed on its own would be constitutionally unfair.” More recently, Chaskalson CJ has, however, noted that the use of the word “reasonableness” in s 33 of the Constitution results in “a variable but higher standard, which in many cases will call for a more intensive scrutiny of administrative decisions than would have been competent under the interim Constitution”: *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 2 SA 311 (CC) at par 108. On the higher standard imposed by “reasonableness” under s 33(1) compared to “rationality” see Pillay (2005) 122 SALJ 419 at 424 – 429.

<sup>158</sup> See Corder in Cheadle *et al* (eds) *South African Constitutional Law: The Bill of Rights* 27-20; Hoexter (2000) 117 SALJ 484; Davis in Bennett *et al* (eds) *Administrative Law Reform* 22 – 24.

<sup>159</sup> Van der Walt & Botha (2000) 7 *Constellations* 341 at 350 (endnote omitted). At 351 Van der Walt & Botha effectively articulate this role of the substantive dimension to judicial review under the s 33 administrative justice rights when they state: “The very essence of constitutional review should be seen to consist in the failure to resolve a particular case of social conflict with reference to the common will of the people (as expressed in ... executive action).”

<sup>160</sup> Van der Walt (2001) 118 SALJ 258 at 296 (footnote omitted).

particularly instrumental or collateral view of administrative justice. In that approach the application of public law rules are triggered by various criteria, which largely represent regulatory concerns sought to be addressed by such public law rules. Administrative law rules are thus applied in order to achieve some other, external purpose, for example restraining superior state power in the relationship, protecting the public's interest in the public money expended or protecting an individual's freedom or property. The advantage of the comprehensive public law approach in contrast is that it allows for the application of administrative law rules as an aim in itself. There is no need to point to an instrumental purpose for the application of the rules. This is in line with the independent guarantee of administrative justice in section 33 of the Constitution and ultimately constitutional transformation in South Africa.<sup>161</sup>

## **5 Efficiency and effectiveness implications of a comprehensive public law approach**

In chapter four I noted the importance of efficient and effective<sup>162</sup> state administration in the current South African context and there is no need to repeat that discussion here.<sup>163</sup> However, against the backdrop of the

---

<sup>161</sup> It is in line with views of transformation in South Africa and the Constitution itself expressed by scholars such as Van der Walt where he criticises the popular bridge metaphor as “instrumental and temporary” and as “an emergency measure that loses its metaphorical and rhetorical significance as soon as the crossing has been made successfully”: Van der Walt (2001) 118 *SALJ* 258 at 260. He argues for an interpretation that views transformation as a permanent process and value in itself. As the Chief Justice recently put it: “What Van der Walt is telling us is that we should promote and sustain transformation itself, rather than view it merely as a means to construct a new society”: Langa (2006) 17 *Stell LR* 351 at 354. See also Botha 2003 *TSAR* 20 at 35 and note 115 above.

<sup>162</sup> On the meaning of the terms efficiency and effectiveness and the distinction between the two, see chapter four at note 367 above.

<sup>163</sup> See chapter four at par 3.1 above. The gist of the argument is that social need in South Africa far exceeds available resources with the result that it is imperative for government to achieve maximum results at minimum cost, ie for government to operate efficiently. This realisation already has a significant impact on law as is evident from the number of provisions in the Constitution expressly calling for government efficiency as well as the keen awareness of efficiency implications of adjudication exhibited by especially Constitutional Court judges.

discussion above on constitutional transformation it is important to note that economic efficiency and effectiveness can be said to form an integral part of transformation in South Africa. The Chief Justice recently emphasised the economic dimension to transformative constitutionalism in South Africa.<sup>164</sup> In describing the “economic revolution” he understands to be part of transformation Justice Langa states: “The provision of services to all ... must be absolutely central to any concept of transformative constitutionalism.”<sup>165</sup> The ability and success of the state in realising this constitutional promise is not only *influenced* by relevant efficient and effective government programs but can largely be said to *depend* on the general efficiency and effectiveness of the administration.<sup>166</sup> This link between government efficiency and the transformative agenda of the Constitution has also been noted in a number of judgements.<sup>167</sup> The claim that the comprehensive public law approach advances constitutional transformation, put forward in paragraph 4 above, must therefore also be assessed against the need for government efficiency and effectiveness. I focus on two specific aspects of the comprehensive public law approach in relation to efficiency and effectiveness. Firstly, I

---

<sup>164</sup> Langa (2006) 17 *Stell LR* 351 at 352. Klare (1998) 14 *SAJHR* 146 at 153 says of the Constitution: “It intends not merely to proclaim democratic political rights but to commit the South African people to achieve a new kind of society in which people actually have the social resources they need meaningfully to exercise their rights” (footnote omitted).

<sup>165</sup> Langa (2006) 17 *Stell LR* 351 at 352 (footnote omitted).

<sup>166</sup> General efficiency is essential in making available the necessary resources for addressing socio-economic needs, ie by reducing spending in other areas and curbing waste, for the achievement of maximum results from the available resources and from a logistics point of view in getting support and services (timeously) to those in need thereof, especially since large numbers of those in need live in rural and isolated parts of the country.

<sup>167</sup> *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 2 SA 91 (CC) at par 41: “In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly”; *Permanent Secretary, Department of Education and Welfare, Eastern Cape, and Another v Ed-U-College (PE) (Section 21) Inc* 2001 2 SA 1 (CC) at par 20.

assess the seemingly contradictory claims regarding the flexibility of public law rules and efficiency and effectiveness. Secondly, I note the potential implications for government efficiency and effectiveness of the invariable availability of judicial review under a comprehensive public law approach.

## 5.1 The flexibility or variability of public law rules

In chapter four I argued that private law forms have the ability to achieve higher levels of efficiency and effectiveness viewed from a strict value for money perspective.<sup>168</sup> Despite the number of difficulties surrounding an efficiency analysis in the context of state activity<sup>169</sup> private law forms, both of conduct and organisation, seem capable of providing more efficient and effective results when the state pursues social aims via market means.<sup>170</sup> While this may simply be because the market is inherently based on private law forms, the point is that by subjecting the state to private law regulation it is placed in a position similar to that of other market participants, which enables it to compete or benefit from competition and hence achieve comparable

---

<sup>168</sup> See chapter four at par 3 above.

<sup>169</sup> See chapter four at par 3.3 above, where I argued that in the context of state conduct there are values such as public participation, transparency and maintaining professional ethics that compete with a narrow value for money efficiency standard in assessing appropriate design of state activity.

<sup>170</sup> Khoza & Adam *The Power of Governance* 128 – 129, 132 – 141 (arguing that a company form is likely to yield the most efficient and effective approach to state commercial activity); Collins *Regulating Contracts* 18: “[T]he success of markets in performing the task of efficient satisfaction of consumer wants is no doubt the major justification for the contractualization of social relations”, in Parker *et al* (eds) *Regulating Law* 28; Seddon *Government Contracts* 34; Wade & Forsyth *Administrative Law* 49; Freedland 1998 *Public Law* 288 at 298 – 299; Harlow & Rawlings *Law and Administration* 139 – 140; Kirchner in Hoffmann-Riem & Schmidt-Aßmann (eds) *Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen* 67 puts this quality of private law regulation well when he states: “Privatrechtliche Regulierung scheint demnach janusköpfig ausgerichtet zu sein an Fairness und Effizienz” (Private law regulation seems directed at fairness and efficiency in a Janus-faced manner (my translation)).

efficient outcomes.<sup>171</sup> The flipside of this argument is that public law regulation places increased burdens on the state, with a resultant negative impact on efficiency and effectiveness.<sup>172</sup> The higher these regulatory burdens are, the less likely the state will be to compete or fully benefit from free-market competition.<sup>173</sup>

Phoebe Bolton has recently argued that the application of public law rules to government procurement, in particular public tender processes, significantly restricts the state's ability to negotiate and vary terms and conditions on an individual basis in commercial activity.<sup>174</sup> Particularly rules of procedural fairness, applied to public tendering on the strength of sections 33(1) and 217(1) of the Constitution,<sup>175</sup> in Bolton's view largely prohibit

---

<sup>171</sup> See Stiglitz in Hardiman & Mulreany (eds) *Efficiency & Effectiveness in the Public Domain* 45 – 48, who argues that the absence of competition on the part of the state is one of the foremost reasons for government inefficiency when compared to private enterprises.

<sup>172</sup> See *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 4 SA 661 (W) at par 16: "To expect the plaintiff to afford its debtors a hearing prior to employment of the ordinary civil process to enforce payment is unreasonable and would create administrative inefficiency, a consequence that runs counter to the aforesaid constitutional objectives"; Asimow (1996) 44 *American Journal of Comparative Law* 393 at 399 *et seq* noting the potential impact on state resources of the general administrative law provisions, especially of procedural fairness, found in the 1993 Constitution with reference to experience with the analogous due process rights in the United States; Mureinik in Bennet *et al* (eds) *Administrative Law Reform* 37.

<sup>173</sup> Teubner in Teubner (ed) *Dilemmas of Law in the Welfare State* 306 notes that in the regulatory crisis experienced in the modern welfare state: "State interventionist law is supposed to be one of the main obstacles to reaching the goal of allocative efficiency"; Khoza & Adam *The Power of Governance* 95; Davies (2006) 122 *LQR* 98 at 99, 114 (noting the potential increased price implications of applying strict public law regulation to state contracting).

<sup>174</sup> Bolton (2006) 17 *Stell LR* 266. See also Bolton *The Legal Regulation of Government Procurement in South Africa* 437 – 451.

<sup>175</sup> Bolton (2006) 17 *Stell LR* 266 at 269, 271 argues that the requirement in s 217(1) of the Constitution that public procurement systems must be "fair" refers to procedural fairness only. This interpretation she bases on the argument that fairness in the administrative law context generally only contains a procedural dimension and not also a substantive one and that s 33(1) of the Constitution, which ostensibly covers the same field as s 217(1), specifically only refers to procedural fairness. Bolton's interpretation of s 217(1) is problematic for a number of

reasons. Firstly, it is not clear why s 217 must be read through the lens of s 33. Just because the two sections overlap in application is no justification for interpreting the one (s 33) to limit the other (s 217) in such a significant way. Interpreting apparent internal limitations of s 33 (limiting fairness to a procedural dimension) to also limit s 217 raises further questions such as whether a general limitations analysis under s 36 can similarly be applied to s 217 via s 33. Such a view would certainly not be correct. If the claimed link between s 217 and s 33 (as both sources of administrative law) is accepted, one can surely just as easily take the complete opposite view and argue that s 217 increases the constitutional requirements for administrative action in the form of procurement by also demanding substantive fairness from the more general and lesser administrative law requirements of s 33. Such an interpretation would indeed be in line with the accepted approach to the relationship between general and particular administrative law. Particular administrative law (such as s 217) quite often sets higher requirements when compared to general administrative law (such as s 33). Secondly, there is no textual support for either linking the two sections in their interpretation or (even if such link is accepted) for limiting fairness under s 217 in such a way. If the textual difference between the two sections is taken seriously and upon the assumption that the two sections apply in the same circumstances, fairness under s 217 must mean something different from procedural fairness in s 33, for otherwise fairness in the former provision would become redundant. That difference is in my view clear from the text, viz fairness in s 217(1) is not limited to a procedural dimension, but also extends to a substantive level. Thirdly, while s 33 may only refer to procedural fairness, that section also requires a measure of substantive fairness by the name of reasonableness. As academic commentators and judges have noted, the requirement of reasonableness inevitably allows courts to scrutinise the merits or substance of public action and to test the fairness thereof. See Hoexter *Administrative Law in South Africa* chapter 6; De Ville *Judicial Review of Administrative Action in South Africa* 212 – 216 (equating the tests of “reasonableness” and “fairness” in Constitutional Court jurisprudence); Corder in Cheadle *et al* (eds) *South African Constitutional Law: The Bill of Rights* 27-16 – 27-19; *Carephone (Pty) Ltd v Marcus NO and Others* 1999 3 SA 304 (LAC) at par 35 – 37; *Van Zyl v New National Party and Others* 2003 3 All SA 737 (C) at par 50 – 51; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 4 SA 490 (CC) at par 45; *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 2 SA 311 (CC) at par 108. It follows that administrative law under the Constitution, in contrast to the position under common law and the 1993 Constitution to which the cases Bolton quotes refer, does contain a requirement of substantive fairness so that a reading of the word “fair” in s 217(1) to include a substantive dimension would not be in conflict with s 33(1). Despite my disagreement with Bolton’s interpretation of s 217 of the Constitution, the recognition of a requirement of substantive fairness in state contracting, both in terms of s 33

government from negotiating and varying terms and conditions during the tender process, at the conclusion of the contract and during the resultant contractual relationship.<sup>176</sup> This, according to Bolton, “may inhibit the attainment of the best possible value for money.”<sup>177</sup> In other words, government efficiency is compromised.<sup>178</sup>

A number of scholars, however, note that public law regulation does not necessarily have to be overly onerous, because of the flexibility of the content of many public law rules.<sup>179</sup> They argue that due to the highly variable<sup>180</sup> content of these rules the intensity of public law regulation can be tailored to the needs of the context in which it is applied. It is important to note that variability relates to the content or substance of the rules rather than their

---

and s 217, strengthens her arguments regarding the limitations on negotiation in public procurement.

<sup>176</sup> Bolton (2006) 17 *Stell LR* 266 at 270, 272, 276, 280 – 281, 287. She argues that variation of the terms of the concluded contract (either at conclusion or thereafter) will only be permissible where the variation is “minor” and the actual contract is not “significantly different” from the one proposed in the tender conditions. She submits that “[w]here ... the price, quantity, quality or timing for the delivery of the goods or services negotiated on is very different from that specified in the call for tenders” the variation will be unacceptable in terms of public law rules.

<sup>177</sup> Bolton (2006) 17 *Stell LR* 266 at 277.

<sup>178</sup> See also Arrowsmith (1994) 53 *Cambridge LJ* 104 at 131, where she notes that strict rules prohibiting negotiations under the EC public procurement regime are aimed at curbing discriminatory practices in tender awards, but do “not necessarily reflect best commercial practice” since such negotiations “frequently produce a significant price reduction.” From an economic point of view, Stiglitz argues that the higher requirements placed on government by means of public law procedures “make it more difficult for public institutions to respond quickly to changing circumstances, and to adapt well to special needs and interests. They interfere with economic efficiency”: Stiglitz in Hardiman & Mulreany (eds) *Efficiency & Effectiveness in the Public Domain* 43.

<sup>179</sup> Hoexter (2000) 117 *SALJ* 484 at 502 – 505, 513 – 514; De Ville *Judicial Review of Administrative Action in South Africa* 221; Beatson in Beatson & Friedman (eds) *Good Faith and Fault in Contract Law* 287-288; Arrowsmith (1990) 106 *LQR* 277 at 290; Bailey 2007 *Public Law* 444 at 451.

<sup>180</sup> The use of the term “variability” to refer to the flexible content of administrative law rules was established in South Africa by Cora Hoexter, see Hoexter (2000) 117 *SALJ* 484; Hoexter *Administrative Law in South Africa* 200 – 201, 328 – 220, 362 – 363.

formal application. The flexibility does not exist in answering the question whether the rules apply or not, but rather in what the rules require of the administrator. In this regard the variability characteristic of public law rules aligns with the comprehensive public law approach since both discount the importance of an initial application query.

### 5.1.1 Procedural fairness

The variability of administrative law rules has recently been judicially endorsed with enthusiasm in South Africa. The quintessential example is the rules of procedural fairness, which have long been recognised as substantially dependent on the context of each case.<sup>181</sup> Although courts subjected the application of the rules of natural justice, in particular *audi alteram partem*, to significant threshold application analyses in common law,<sup>182</sup> they also recognised the flexible content of these rules when applied.<sup>183</sup> Under the

---

<sup>181</sup> Baxter *Administrative Law* 541 – 542; Hoexter *Administrative Law in South Africa* 325 – 330, (2000) 117 SALJ 484 at 502; De Ville *Judicial Review of Administrative Action in South Africa* 221, 246; Wade & Forsyth *Administrative Law* 497 – 499.

<sup>182</sup> This was done both by a rigid classification of functions in terms of which the type of administrative action determined whether the *audi* rule applied and by a strict requirement of an adverse impact of the action: Baxter *Administrative Law* 572 – 587; Hoexter *Administrative Law in South Africa* 351 – 355. The rigidity of this approach was only relaxed following the judgement in *Administrator, Transvaal, and Others v Traub and Others* 1989 4 SA 731 (A) where the classification of functions was fundamentally questioned and the impact requirement was extended to include legitimate expectations.

<sup>183</sup> The classical formulation of this approach followed in South African courts is that of Lord Tucker in *Russell v Duke of Norfolk and Others* (1949) 1 All ER 109 at 118: "The requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth." See *Schulte v Van der Berg and Others* NNO 1991 3 SA 717 (C) at 720; *Administrator, Transvaal, and Others v Theletsane and Others* 1991 2 SA 192 (A) at 199 (per Botha JA), 206 (per Smalberger JA); *Administrator, Transvaal and Others v Traub and Others* 1989 4 SA 731 (A) at 758; *De La Rouviere v SA Medical and Dental Council* 1977 1 SA 85 (N) at 98 – 100; *Carr v Jockey Club of South Africa* 1976 2 SA 717 (W) at 723; *Turner v Jockey Club of South Africa* 1974 3 SA 633 (A) at 646; *Bell v Van Rensburg* NO 1971 3 SA 693 (C) at 727; *Elsworth v Jockey Club of South Africa* 1961 4 SA 142 (W) at 150; Corder (1980) 43 THRHR 156.



broader constitutional notion of procedural fairness variability has not only been maintained but also extended.<sup>184</sup> Procedural fairness now entitles an individual to “the principle and procedures . . . which, in (the) particular situation or set of circumstances, are right and just and fair.”<sup>185</sup> The courts have identified a number of factors to be taken into account in determining the content of procedural fairness in a given case.<sup>186</sup> These factors specifically include the potential impact of the procedural fairness requirements on government efficiency. In *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal*<sup>187</sup> O’Regan J stated:

---

<sup>184</sup> *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 SCA 25 (RSA) at par 63; *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 2 SA 311 (CC) at par 147, 151 – 155 (per Chaskalson CJ); *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 3 SA 589 (CC) at par 113; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 4 SA 490 (CC) at par 45; *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 3 SA 265 (CC) at par 104; *Chairman, Board on Tariffs and Trade, and Others v Brenco Inc and Others* 2001 4 SA 511 (SCA) at par 14, 19; *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho Intervening)* 2001 3 SA 1151 (CC) at par 101; *Nortje en 'n Ander v Minister van Korrektiewe Dienste en Andere* 2001 3 SA 472 (SCA) at par 17; *Permanent Secretary, Department of Education and Welfare, Eastern Cape, and Another v Ed-U-College (PE) (Section 21) Inc* 2001 2 SA 1 (CC) at par 22; *Janse van Rensburg NO and Another v Minister of Trade and Industry and Another NNO* 2001 1 SA 29 (CC) at par 24; *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) at par 219; *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 2 SA 91 (CC) at par 39 – 41; Hoexter *Administrative Law in South Africa* 328 – 330; De Ville *Judicial Review of Administrative Action in South Africa* 246 – 248.

<sup>185</sup> *Van Huyssteen and Others NNO v Minister of Environmental Affairs and Tourism and Others* 1996 1 SA 283 (C) at 305 quoting with approval the statement of Lord Morris of Borth-y-Gest in *Wiseman v Borneman* [1969] 3 All ER 275.

<sup>186</sup> See De Ville *Judicial Review of Administrative Action in South Africa* 247 – 248; *Chairman, Board on Tariffs and Trade, and Others v Brenco Inc and Others* 2001 4 SA 511 (SCA) at par 19.

<sup>187</sup> 1999 2 SA 91 (CC) at par 41.

In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively...<sup>188</sup>

More recently the courts have extended this reasoning to the administrative law principles of reasonableness, the duty to provide reasons and even lawfulness.

### **5.1.2 Reasonableness, reasons, lawfulness and legality**

In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*<sup>189</sup> O'Regan J expressly held reasonableness under section 33 of the Constitution to be similarly flexible in content as procedural fairness. She continued to list a number of factors that will be relevant in giving content to reasonableness in a given case. These include

the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing

---

<sup>188</sup> The impact of increased procedural requirements on the administration was already recognised in common law as relevant in determining what procedural fairness required in a given case, see *Schulte v Van der Berg and Others NNO* 1991 3 SA 717 (C) at 720. In the constitutional era, the impact on the state as a relevant factor has increased in significance. It is not only the impact of increased procedural requirements on the state generally that is at issue, but in particular the impact on the state's ability to effect its transformation obligations that is taken into account, see *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 2 SA 91 (CC) at par 41. See also *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho Intervening)* 2001 3 SA 1151 (CC) at par 102 where the need for quick state action to alleviate the plight of flood victims played an important role in assessing what procedural fairness required of the state in that case; *Chairman, Board on Tariffs and Trade, and Others v Brenco Inc and Others* 2001 4 SA 511 (SCA) at par 19 where "the public interest in an effective administrative process" and "public interest in permitting administrative powers to be effectively exercised" were listed as relevant factors in determining the content of procedural fairness.

<sup>189</sup> 2004 4 SA 490 (CC) at par 45.

interests involved and the impact of the decision on the lives and well-being of those affected.<sup>190</sup>

Government efficiency easily fits into any one of a number of these factors. The duty to provide reasons<sup>191</sup> has similarly been interpreted to contain a variable content.<sup>192</sup> Even prior to the legislative endorsement of the duty to provide “adequate reasons”<sup>193</sup> courts have used the adequacy standard to adopt a variable approach to the duty to provide reasons.<sup>194</sup> Concerns regarding overburdening the state no doubt play an important role in adopting such flexibility.<sup>195</sup> Even the content of the lawfulness requirement can be viewed as variable. For example, in particular cases courts may be able to increase or reduce the burden on the state by interpreting requirements in empowering provisions as either mandatory or directory<sup>196</sup> or alternatively by either insisting on strict compliance with statutory requirements or allowing

---

<sup>190</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 4 SA 490 (CC) at par 45. See also Pillay (2005) 122 SALJ 419.

<sup>191</sup> In terms of s 24(c) of the 1993 Constitution, s 33(2) of the Constitution and s 5 of PAJA.

<sup>192</sup> *Commissioner, South African Police Service, and Others v Maimela and Another* 2003 5 SA 480 (T) at 486 – 487; *Moletsane v Premier of the Free State and Another* 1996 2 SA 95 (O) at 98; Hoexter (2000) 117 SALJ 484 at 503. This variability is also captured in s 5(2) of PAJA, which obliges administrators to provide “adequate reasons” once a request for reasons has been received.

<sup>193</sup> In s 5(2) of PAJA.

<sup>194</sup> See *Commissioner, South African Police Service, and Others v Maimela and Another* 2003 5 SA 480 (T) where PAJA was not applicable.

<sup>195</sup> See Hoexter *Administrative Law in South Africa* 417 – 418; De Ville (1995) 11 SAJHR 264 at 271; Asimow (1996) 44 *American Journal of Comparative Law* 393 at 395.

<sup>196</sup> I am not suggesting that courts have a complete free hand in such determination. A specific empowering provision may perhaps be clear as to whether it constitutes a mandatory or directory requirement. However, in many instances the empowering provision will not be so patently clear or an apparent clear provision may allow an alternative interpretation when other factors such as the purpose of the statute, the provision of sanctions and the constitutionality of the particular section is taken into account. See eg *Noble and Barbour v SA Railways and Harbours* 1922 AD 527 at 540 where the word “may” in an empowering provision was read as conveying a mandatory requirement; *Motorvoertuigassuransiefonds v Gcwabe* 1979 4 SA 986 (A) at 990 where the court stated: “Our Courts have frequently decided that the use of the word ‘shall’ in a statutory provision does not necessarily mean that the provision is peremptory”; De Ville *Constitutional & Statutory Interpretation* chapter 5.

substantial compliance to suffice.<sup>197</sup> De Ville argues that “administrative efficiency” may be relevant in such determinations, in other words, when a court has to give specific content to lawfulness requirements in a given case.<sup>198</sup> Other lawfulness requirements with variable content are the duty to take account of all relevant considerations and to ignore irrelevant considerations,<sup>199</sup> rules relating to errors of law<sup>200</sup> and scrutiny of the purpose of the empowering provision compared to the purpose of the action.<sup>201</sup>

It is arguable that the recognition of the principle of legality flowing from the foundational rule of law as a broader constitutional control on public power than the administrative law principles endorsed by section 33 of the Constitution, itself is a recognition of the variability of public law controls. Legality is in many ways a “lighter” form of public law regulation than full administrative law control. The former is accordingly applied to exercises of public power that call for less judicial intrusion than full administrative law scrutiny. Put differently, while legality and administrative law control may amount to implementation of the same principles, they represent varying degrees of regulatory freedom granted to the executive.

### **5.1.3 Striking a balance between public interest and efficiency**

When the variability of public law regulation is considered in the context of judicial regulation of state commercial activity it seems that public law regulation is capable of striking the ideal balance between addressing regulatory concerns and allowing government efficiency. As Stephen Bailey notes in English law: “Public law principles are sufficiently flexible to enable the court to ensure that a public body is not hamstrung in its commercial

---

<sup>197</sup> Hoexter (2000) 117 SALJ 484 at 503.

<sup>198</sup> De Ville *Judicial Review of Administrative Action in South Africa* 267, 477 – 478. See also De Ville *Constitutional & Statutory Interpretation* 262.

<sup>199</sup> PAJA s 6(2)(e)(iii). The variability exists in determining what is relevant and what not.

<sup>200</sup> PAJA s 6(2)(d). The margin of error tolerated allows for variability.

<sup>201</sup> PAJA s 6(2)(e)(i), (ii). Especially the level of causality required between the empowering purpose and the action allows for considerable flexibility in these requirements.

dealings except to the extent that a genuine public interest is at stake.”<sup>202</sup> The comprehensive public law approach thus emerges as a mechanism for balancing public interest concerns against government efficiency and effectiveness.<sup>203</sup> It can achieve the balance Wade & Forsyth have in mind when they state: “Justice and efficiency go hand in hand, so long at least as the law does not impose excessive refinements.”<sup>204</sup> The key to avoiding such excessive judicial intervention lies in the flexible content of public law rules.

#### 5.1.4 Enhancing efficiency

The variability of the content of public law rules is not only useful in avoiding burdensome judicial regulation of state action under public law, but may enhance efficiency and effectiveness when compared to private law regulation. In his assessment of the respective advantages of private and public law approaches to public tendering, Beatson highlights the flexibility of public law rules as a major advantage over private law solutions.<sup>205</sup> He argues that public law rules such as the doctrine of legitimate expectations offer much more flexible regulation of the pre-contractual stage of public tendering than private law approaches such as implied contract.<sup>206</sup> The result

---

<sup>202</sup> Bailey 2007 *Public Law* 444 at 451

<sup>203</sup> Public interest and government efficiency and effectiveness are not obvious opposites in need of balancing. The latter can indeed be viewed as part of former: Government efficiency and effectiveness is in the public interest, see *Chairman, Board on Tariffs and Trade, and Others v Brenco Inc and Others* 2001 4 SA 511 (SCA) at par 19. The kind of tension I have in mind is similar to that described by Freedland 1994 *Public Law* 86 at 103 in a public administration context: “Above all, considerations of public policy and public interest tend to be marginalised by commercial and competitive considerations.” With public interest I mean those matters that are generally the concern of public law, such as abuse of power, transparent and accountable government and realising social objectives such as poverty alleviation.

<sup>204</sup> Wade & Forsyth *Administrative Law* 440.

<sup>205</sup> Beatson in Beatson & Friedman (eds) *Good Faith and Fault in Contract* 287.

<sup>206</sup> Beatson in Beatson & Friedman (eds) *Good Faith and Fault in Contract* 287. However, see Arrowsmith (1994) 53 *Cambridge LJ* 104 at 115, where she argues that the implied contract approach may be just as flexible as the public law legitimate expectation one, but superior in the way that it provides a monetary remedy.

of this flexibility is increased freedom on the part of the state to change direction when necessary.<sup>207</sup> Consequently, the state is better placed to pursue optimal efficiency and effectiveness in its commercial activity.<sup>208</sup>

---

<sup>207</sup> Beatson in Beatson & Friedman (eds) *Good Faith and Fault in Contract* 287. There are also other public law rules that have a similar potential to enhance efficiency in state commercial activity in contrast to a private law approach. On the danger that private law rules may decrease state efficiency and effectiveness, see chapter four at par 3.4 above and in particular the recognition of this danger in French law by Autexier (1993) 52 *VVDStRL* 285 at 293. One example of a public law rule that may help increase efficiency is the principle of government effectiveness or the no-fettering principle. In terms of this principle the state cannot bind its future discretionary action in a manner that would inhibit it from acting in the best interest of the public, see chapter four at note 409 above and Davies (2006) 122 *LQR* 98; Wade & Forsyth *Administrative Law* 330 – 334, 840 – 841; De Ville *Judicial Review of Administrative Action in South Africa* 116 – 120; Hoexter *Administrative Law in South Africa* 285 – 291; Turpin *Government Procurement and Contracts* 85 – 90; Baxter *Administrative Law* 419 – 424; Bolton *The Law of Government Procurement in South Africa* 86 – 95. This principle may thus allow the state to pursue best public interest even in the face of conflicting contractual obligations. Since the conflicting contractual arrangements will be void (or at least voidable), because of the application of the no-fettering principle, government will both be free to pursue a different course of action and avoid a potential cost of such action in the form of a damages claim. The efficient achievement of public objectives, best value at lowest cost, is thus facilitated by the application of this rule. It should be noted, however, that government will not be able to use this rule solely for the purpose of enhancing efficiency (even if that purpose can be said to be in the public interest, see *Chairman, Board on Tariffs and Trade, and Others v Brenco Inc and Others* 2001 4 SA 511 (SCA) at par 19), that is in a way that would create a public law route to efficient breach of contract. Mitchell *The Contracts of Public Authorities* 19 states: “[T]he principle of government effectiveness ... is not for example intended to enable a governmental body to escape the consequences of a contract which turns out to be disadvantageous in the ordinary commercial sense.” The rule will only operate “in cases where otherwise the disadvantages to the community would be considerable”: Mitchell *The Contracts of Public Authorities* 19; Arrowsmith *Civil Liability and Public Authorities* 72, 76. An interesting question, which I will not pursue here, is whether the state’s action in reliance on the no-fettering principle that has the effect of voiding a private counterparty’s contractual rights amounts to a deprivation of property under s 25 of the Constitution and hence requires compensation. If that is the case, the claimed increase in efficiency facilitated by the no-fettering rule will of course be largely undermined. Economists have, however, also noted that the difficulty of strictly binding the state’s hands, of which the no-fettering principle is certainly one cause, may hold significant negative implications for state efficiency. This difficulty has the effect that public organisations are not subject to “hard

## 5.2 The impact of the availability of judicial review

While the regulatory burden on the state is reduced by the flexible content of public law rules, the mere availability of judicial review under a comprehensive public law approach holds potentially adverse implications for government efficiency and effectiveness. Regardless of how “light” one can make the content of the public law regulation it is in the application dimension that a comprehensive public law approach undermines government efficiency and effectiveness. The argument is a relatively simple one, namely that by merely instituting judicial review proceedings a claimant can effectively halt government programs<sup>209</sup> and delay their execution considerably.<sup>210</sup> The

---

budget constraints” like their private counterparts, with the result that the effectiveness of incentives, as a major driving force towards reaching efficient outcomes, is weakened: Stiglitz in Hardiman & Mulreany (eds) *Efficiency & Effectiveness in the Public Domain* 47. Arrowsmith *Civil Liability and Public Authorities* 72 notes a similar adverse effect on government efficiency of the no-fettering principle, where she states: “Thus, for example, it is useful for an authority to be able to make covenants restricting the way in which it will use land, in order to persuade the landowner to sell, or to sell at a reasonable price.” A strict application of the no-fettering principle in such an instance may result in the government paying a higher price, which impacts adversely on government efficiency.

<sup>208</sup> Efficiency, in a narrow sense of value for money, is also enhanced in a rather harsh or extreme manner by the absence or near absence under public law of monetary compensation to the private counterparty where the state changes direction and needs to avoid a transaction. In South African administrative law, monetary compensation will only be available in “exceptional cases” in terms of s 8(1)(c)(ii)(bb) of PAJA. Private law remedies available in such instances can be seen to undermine efficiency. In South African law, so-called “efficient breach of contract” is generally not possible since specific performance is the default remedy for breach of contract: Van der Merwe *et al Contract: General Principles* 351.

<sup>209</sup> Judicial review proceedings, especially in a commercial context such as public tenders, are often preceded by applications for interdicts to freeze the relevant administrative action pending the outcome of the review. On the impact of interim relief under EC procurement rules applied in English law, see Arrowsmith (1992) 1 *Public Procurement LR* 92 at 100 – 101, 111 – 114. She argues that inconvenience to either the public or administration because of the delay in execution of government functions caused by judicial review proceedings may be a factor motivating courts to deny interim or final relief and that English case law seems to suggest that such factor will weigh heavily against interim relief in public procurement cases. In South Africa, Davis J recently adopted a similar line of reasoning when he denied interim

implications for government effectiveness and efficiency are evident.<sup>211</sup> I

---

relief to a private party preceding an application for judicial review despite the ostensible presence of reviewable errors in the state's conduct and the private party satisfying all the requirements for interim relief: *Stock and Another v Minister of Housing and Others* 2007 2 SA 9 (C). In this case the state leased a piece of land adjacent to the applicant's land for the purpose of constructing temporary housing for people living in an informal settlement while formal houses were constructed on the site of the present informal settlement. It was common cause that the state by mistake did not involve the applicant in the consultation process preceding the decision to construct the temporary housing as it was obliged to do in terms of administrative law rules. The applicant accordingly applied for urgent interim relief to halt the construction of the temporary shelters, which was already underway, pending a review application. In exercising his discretion to deny the interim relief, Davis J stated at 19: "To decide in favour of applicants and to the detriment of the implementation of desperately needed housing would, in my view, be to act contrary to all important principles which underlie the Constitution."

<sup>210</sup> It is of interest to note that the EC Directive 89/665, which contains the remedies for the enforcement of EC public procurement rules, expressly provides in art 2(3) that review proceedings need not have an automatic suspensive effect and in art 2(4) that interim measures may be denied when the negative consequences outweighs the benefits: Arrowsmith (2006) 35 *Public Contract Law Journal* 337 at 376.

<sup>211</sup> This is illustrated by the facts in *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA). The KwaZulu-Natal government offered on tender a property for sale in Richards Bay (presumably during 1994). In February 1995 the tender was awarded to Naidoo. Logbro Properties CC's tender was rejected. It consequently challenged the award of the tender in the High Court and in February 1997 the tender was set aside upon review and the matter referred back to the tender committee. The committee decided to call for fresh tenders because of the increase in property values since the original call for tenders. Logbro Properties CC again approached the court in challenge of this decision and eventually prevailed in the Supreme Court of Appeal, which, in October 2002, set the committee's decision to call for fresh tenders aside and again referred the matter back to the committee. In total approximately eight years had thus passed since the KwaZulu-Natal government initially embarked on the sale of the property and still the transaction was not closed. Even if one disregards the irregularities in the process, which resulted in it being set aside twice, two years still lapsed between the original award of the tender and judgement in the first review application. Thus, even if the first judgement was in favour of the provincial government, the review itself delayed the transaction with two years. The drastic change in property values in those two years, which motivated the committee to call for fresh tenders, illustrates the potentially adverse financial impact of the review, even if unsuccessful. If the award of the tender was upheld in the first review proceedings, the provincial government would have been



must therefore disagree with Cora Hoexter when she argues that “over-enthusiastic or unwarranted intervention – and not scrutiny – is where the real difficulty lies, because that is where the destructive effects of review may begin.”<sup>212</sup> From a government efficiency and effectiveness perspective the “destructive effects of review” already start with the availability of judicial review.

### **5.2.1 Efficiency decreased by increased flexibility**

Asimow arguably takes the argument, advanced above, a step further when he states:

It is all very well to say that the right to natural justice is flexible and the agency is given substantial deference in deciding appropriate procedures; a court must still decide whether the omission of one or more trial-type elements rendered the particular procedure unfair.<sup>213</sup>

This statement captures two bases on which the availability of review may decrease government efficiency and effectiveness. Higher levels of flexibility in the content of administrative justice requirements linked to generally available judicial review may result in increased inefficiency. It firstly becomes more difficult for administrators to determine *a priori* what the rules require of them (how they should act) and secondly, almost every such determination is open to question in court with resultant delays and increased expenditure. The only sure way for administrators to avoid such spending is to adopt burdensome trial-like procedures, which do not only emulate courts in the manner in which decisions are taken, but also in substance exhaust every

---

under an obligation to sell the property to the winning tenderer at a price far below then prevailing market value. The increase in the value of the property over the two years would have been lost to the public purse simply because of the availability of the review.

<sup>212</sup> Hoexter (2000) 117 *SALJ* 484 at 493 – 494.

<sup>213</sup> Asimow (1996) 44 *American Journal of Comparative Law* 393 at 403 (footnote omitted).

conceivable contingency. Such an approach in itself will have enormous efficiency and effectiveness implications.<sup>214</sup>

### **5.2.2 The adverse impact illustrated by *Steenkamp NO v Provincial Tender Board, EC***

The potentially adverse impact of the availability of judicial review is illustrated by the recent Constitutional Court judgement in *Steenkamp NO v Provincial Tender Board, Eastern Cape*.<sup>215</sup> The majority in that case rejected private law regulation, in the form of delictual liability, in favour of public law regulation, essentially in the form of judicial review with related consequential relief,<sup>216</sup> of the actions under the tender process before the court.<sup>217</sup> Interestingly, the majority noted one purpose of public remedies as “to advance efficient and effective public administration.”<sup>218</sup> The effect of the majority judgement in favour of such public remedy on government efficiency and effectiveness is the exact opposite.

---

<sup>214</sup> See also Stiglitz in Hardiman & Mulreany (eds) *Efficiency & Effectiveness in the Public Domain* 44, who argues that the risk averse nature of public servants results in excessive reliance on procedures and the resultant familiar bureaucratic red-tape, which have significant negative implications for government efficiency.

<sup>215</sup> 2007 3 SA 121 (CC). See chapter four at par 2.4.5 above for a discussion of the facts of this case. In essence it dealt with a delictual claim by an initially successful tenderer for out-of-pocket expenses incurred while performing under the awarded tender prior to it being set aside upon judicial review.

<sup>216</sup> Although the majority noted that judicial review may not be available to the successful tenderer, such as the one before the court, it held that judicial review would be available to regulate the tender process at the instance of one of the unsuccessful tenderers and that the successful tenderer would consequently be able to share in the benefit of such regulation along with the other unsuccessful tenderers: *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 49, 54.

<sup>217</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 29 – 30, 47, 54, 56. The question before the court related specifically to the “improper [negligent] but honest exercise of the discretion of the tender board”: par 47.

<sup>218</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 29.

### 5.2.2.1 Performance delayed

The majority of the court reached their conclusion on a number of policy considerations. One consideration was the view that the successful tenderer could avoid loss in the form of out-of-pocket expenses by delaying performance until such time as it is clear that award of the tender would not be set aside under judicial review proceedings.<sup>219</sup> Another policy consideration was the increased cost that delictual liability would bring to tender processes and the public purse generally.<sup>220</sup> The effect of these two considerations taken together illustrates the majority's failure to appreciate the efficiency and effectiveness implications of their choice in denying private law regulation in favour of public law regulation. The dissenting judgement of Langa CJ and O'Regan J pertinently notes one aspect of this failure:

In our view, it would be highly undesirable to suggest that a successful tender applicant should hesitate before performing in terms of the contract, in case a challenge to the tender award is successfully brought. Such a principle, in our view, would undermine the constitutional commitments to efficiency and the need for delivery which are of immense importance to both government and citizens alike.<sup>221</sup>

The minority is correct in noting the adverse impact of a delay in performance on efficiency.<sup>222</sup> Moseneke DCJ's argument, for the majority, that "in the

---

<sup>219</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 51 – 52.

<sup>220</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 55.

<sup>221</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 83.

<sup>222</sup> Cf Arrowsmith's criticism of the "mandatory standstill period" under the EC Directive 89/665 on remedies for the enforcement of EC procurement rules as interpreted by the ECJ in Case C-81/90, *Alcatel Austria AG v Bundesministerium fur Wissenschaft und Verkehr*, 1999 ECR I-7671. In this case the ECJ held that the Directive's requirement that states provide an effective set-aside remedy against public procurement award decisions necessitates a national remedy system that allows for the challenge of award decisions prior to the conclusion of the relevant public contract. The European Commission interpreted this ruling to require a mandatory standstill period between award decision and conclusion of the contract during which challenges to the award decision can be brought. The UK initially implemented the ECJ's ruling by allowing for a limited period *following* the conclusion of the

ordinary course tenderers who dispute the correctness of an award would challenge its correctness relatively quickly so that the question of out-of-pocket expenses would be unlikely to arise<sup>223</sup> is supported neither by the facts of this case<sup>224</sup> nor by the current state of South African law and legal process. In terms of section 7(1) of PAJA, which generally governs judicial review of public tender processes, such proceedings must be instituted “without reasonable delay and not later than 180 days” after any internal remedies have been exhausted or, in the absence of any such remedies, after the person concerned was informed of the decision. However, section 9(1)(b) of PAJA provides for the extension of the 180 day period by agreement between the parties or by the court. While a 180 day minimum period is a much shorter period of time than the year that lapsed in the present case it is still a significant delay in the execution of a commercial transaction. It should also be kept in mind that the 180 day limit is only the period in which the review proceedings should be instituted and that the conclusion of such proceedings, including potential appeals, may drag the matter out much longer.<sup>225</sup> Such delays inevitably have a negative impact on government effectiveness and efficiency.

---

public contract to challenge the award of the contract. However, under pressure from the European Commission, the UK eventually also introduced a mandatory standstill period: Arrowsmith (2006) 35 *Public Contract Law Journal* 337 at 378. The majority’s judgement in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) effectively amounts to the judicial creation of a standstill period, although not prior to the conclusion of the contract, but between conclusion and performance. Both this judgement and the ECJ’s ruling noted above illustrate the potential farreaching regulatory role of courts in relation to state commercial activity.

<sup>223</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 51.

<sup>224</sup> The judicial review of the initial tender award commenced only a year after the award: *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) at par 51. See also *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others* 1999 1 SA 324 (CkH) where the initial judicial review of the tender award is reported. From the latter judgement it emerges that the award decision was taken on 22 March 1996 and that the judicial review proceedings commenced on 3 June 1997, with judgement on 13 June 1997, resulting in more than a year between award and setting aside under review.

<sup>225</sup> The presence of internal remedies will further increase the delay since the 180 day period will only commence following the finalisation of internal remedies. For a discussion of various

### 5.2.2.2 Risk and hence cost increased

Apart from the delay in performance introduced by the majority judgement in *Steenkamp NO v Provincial Tender Board, Eastern Cape*,<sup>226</sup> that judgement also has wider cost implications that contradict the cost-saving aims of the majority. The refusal to apply private law regulation (delictual liability) in favour of public law regulation (judicial review) results in the highly inefficient outcome of forcing all private parties to internalise the risk of government contracts being set aside (or even just significantly delayed) in judicial review proceedings. In other words, the mere possibility of judicial review linked to the potential absence of a damages remedy for costs legitimately incurred under the contract and prior to it being set aside, increases the risk of the private party and will force parties to hedge against that risk,<sup>227</sup> with the resultant cost passed on to the state.<sup>228</sup>

---

internal remedies available in government procurement processes, see Bolton *The Law of Government Procurement in South Africa* 310 – 312. Even in the absence of internal remedies, the 180 day period may in practice be considerably extended when the right to reasons is kept in mind. PAJA s 7(1)(b) states that the 180 day period is calculated from the date upon which the person concerned is informed of the decision and the reasons for the decision. However, there is no general duty on administrators to supply reasons with all decisions under PAJA. An affected person has the right to request reasons under s 5(1) of PAJA and only then will there be a duty on the administrator to provide reasons. PAJA s 5(1) allows the affected person 90 days following the date upon which she became aware of the decision to request reasons and s 5(2) subsequently allows the administrator another 90 days to provide such reasons. It follows that there is an initial maximum 180 day period following the date upon which the affected person became aware of the decision during which reasons is to be requested and provided and only following that initial maximum 180 day period will the 180 day period in terms of s 7(1) for launching judicial review proceedings start to run. It is thus possible that the time limit on bringing judicial review proceedings will only expire 360 days after the decision was taken.

<sup>226</sup> 2007 3 SA 121 (CC).

<sup>227</sup> The fact that a damages remedy will be absent in terms of *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) where administrators made an honest mistake, means that private parties do not have to take an overly pessimistic view of state conduct for them to perceive and hence protect against this risk. There is thus no room for an argument that such risk averse conduct is somehow unwarranted, against public policy or

This outcome is highly inefficient for a number of reasons. Firstly, the state is undoubtedly better placed to minimise the risk of a public tender being set aside upon review than the private party. An efficient approach will thus place that risk on the state, which in the present context means placing delictual liability on the state. Secondly, allowing delictual liability in the limited number of instances where a state contract is set aside upon review, may amount to higher costs for the state in those instances, but has the wider effect of removing a similar risk from all other state contracts, with the result that private parties have no need to protect against such risk. Accordingly, the costs of all state contracts are reduced. Thirdly, the analysis above shows that it is the initial judicial review and subsequent setting aside of the tender award that hold significant cost implications for the state rather than the subsequent claim for damages attendant upon such review. To reduce costs the focus should thus be on reducing judicial review or at least the impact of judicial review.<sup>229</sup>

### **5.2.3 Public and private regulation combined in an optimal approach**

Two caveats to the discussion above must however be noted. Firstly, the first two options noted above as more efficient ways of dealing with this scenario<sup>230</sup> do not exclude public law regulation in favour of private law regulation. Both are rather good illustrations of how private and public law regulation can work in conjunction to achieve optimal regulation. In this case

---

even immoral, as may be arguable where private parties expect the state to act in bad faith and accordingly hedge against such contingency.

<sup>228</sup> Tenderers will typically offer lower prices when the state is selling and ask higher prices when the state is buying in order to off-set the higher transaction costs brought about by the higher risk.

<sup>229</sup> See Arrowsmith (1992) 1 *Public Procurement* LR 92 at 101, where she argues that in judicial review proceedings “the court should take account of the interests of the party awarded the contract, particularly if he has begun preparation or performance in ignorance of any dispute over the award decision.” She submits that this factor may be a relevant one when the court exercises its discretion to refuse relief.

<sup>230</sup> That is in essence placing the risk of the contract being set aside on the state by allowing delictual liability for expenses incurred in the execution of the contract that is later set aside.

judicial review should be allowed at the earlier stage to protect legitimate public interests, but then private law regulation should be adopted at the later stage when dealing with the consequences of the preceding judicial review. Ideally, an optimal and efficient regulatory approach would roll these two sets of regulation into one process so that there is no need for repeated litigation. Such a result cannot be achieved under the comprehensive public law approach where public law regulation is allowed to run its full course followed by another round of judicial intervention to address resultant problems, even if private law regulation is then applied. The structure of a comprehensive public law approach simply does not allow for such a single process. When the award of the tender is challenged under public law regulation, judicial review, the successful tenderer would align itself with the state and want to argue that the award should be upheld. However, as soon as the award is set aside, the successful tenderer's interests may instantly turn to stand in direct opposition to that of government. The cases of *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others*<sup>231</sup> and *Steenkamp NO v Provincial Tender Board, Eastern Cape*<sup>232</sup> illustrate this progression. The need thus emerges for the development of a combination of private and public law regulation that is more sophisticated than simply adding the one after the other. I investigate such a development further in the next chapter.

#### **5.2.4 Developing compensation as public law remedy**

The second *caveat*, following on from the first, is that public law regulation may arguably evolve to provide the kind of single, coherent regulatory process described as optimal above. This may be feasible if compensation is utilized more effectively as a public law remedy following judicial review.<sup>233</sup> Such an approach should consider not only awarding compensation to unsuccessful tenderer(s) following a successful review application, but also to the initially successful tenderer for damages following the setting aside of the contract. However, the development of such an approach in South African law in the

---

<sup>231</sup> 1999 1 SA 324 (CKH).

<sup>232</sup> 2007 3 SA 121 (CC).

<sup>233</sup> PAJA s 8(1)(c)(ii).

near future is unlikely. Firstly, PAJA limits compensation to “exceptional cases.”<sup>234</sup> In the light of the high frequency of judicial review applications of public tender procedures in South Africa and the relatively high success rate of such applications it is doubtful whether any such instance will easily qualify as an exceptional case. Even if some cases do qualify as exceptional the limitation will still impede the development of any general approach based on the compensation remedy. The “exceptional case”-limitation has the effect of severely limiting any creative development of public law remedies of compensation in an administrative law context under the courts’ general power to “grant any order that is just and equitable.”<sup>235</sup> Secondly, the policy considerations that motivated the majority in *Steenkamp NO v Provincial Tender Board, Eastern Cape*<sup>236</sup> to deny delictual liability are of such a broad and general import that they will in all likelihood also lead to a rejection of a public law compensation remedy under similar circumstances.

### 5.2.5 Restrictions on judicial review

The dangers present in the mere availability of judicial review, including the potential adverse impact on government efficiency and effectiveness, are widely recognised in Western legal systems. A variety of legal mechanisms have been created to limit the *availability* of judicial review in the interest of preserving government effectiveness. In South African law this limitation takes many forms. It exists in the narrow definition of “administrative action” in section 1(i) of PAJA.<sup>237</sup> This definition limits “administrative action” and by implication those actions that are subject to (administrative law) judicial review to action that adversely affects rights and that has “a direct, external legal effect.”<sup>238</sup> Especially this latter element of the definition, deriving from

---

<sup>234</sup> PAJA s 8(1)(c)(ii).

<sup>235</sup> PAJA s 8(1). See also s 172(1)(b) of the Constitution.

<sup>236</sup> 2007 3 SA 121 (CC). See also the policy considerations that motivated the Supreme Court of Appeal to reject the delictual claim: *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA).

<sup>237</sup> Pfaff & Schneider (2001) 17 *SAJHR* 59 at 65 – 66, 71.

<sup>238</sup> PAJA s 1(i).



German law, serves to shield the internal functioning of the administration from judicial intrusion.<sup>239</sup> Other limitations in PAJA are the potential exemptions and variations in section 2 in order to “promote an efficient administration”,<sup>240</sup> the time limits found in section 7(1) and the duty to exhaust internal remedies in section 7(2).

In English law the availability of judicial review has been limited by the restrictive procedures contained in section 31 of the Supreme Court Act 1981 and part 54 of the Civil Procedure Rules. In terms of these provisions leave or permission must be obtained from the court before an application for judicial review can be brought.<sup>241</sup> These procedures limit the availability of judicial review to a large extent.

Although these limiting mechanisms raise questions and are often problematic in their own right they do underline the widely recognised problems with judicial review discussed in this section. The implication for present purposes is that a comprehensive public law approach that entails general and constant recourse to judicial review may not be viable in fashioning a judicial approach to the regulation of state commercial activity.<sup>242</sup>

## **6 Ambit of “the state” and the scope of regulation**

Despite the comprehensive public law approach’s advantage of applying consistently to state conduct and hence avoiding much of the difficulty of the classification approach discussed in chapter three, the former approach

---

<sup>239</sup> Pfaff & Schneider (2001) 17 *SAJHR* 59 at 70 – 75. Such internal processes are not immune from judicial scrutiny. Once the internal procedures have resulted in a final decision that has effect outside of the administration, judicial review of the process in its entirety will be possible. The effect of these elements of the definition of administrative action is to prevent judicial intervention at any point prior to the final decision. This naturally enhances efficiency since the administration is allowed to complete its function without constant legal disruption.

<sup>240</sup> PAJA s 2(1)(b).

<sup>241</sup> Wade & Forsyth *Administrative Law* 653, 656 – 658; Craig *Administrative Law* 838 – 839; Bailey (2005) 14 *Public Procurement LR* 291 at 292 – 193.

<sup>242</sup> Arrowsmith (1990) 106 *LQR* 277 at 291 confirms this conclusion when she states: “[T]here may be valid reasons for limiting the operation of judicial review in specific areas involving the exercise of contractual powers.”

cannot avoid problematic categorisation issues completely. This becomes evident when one moves away from the centre of what is traditionally understood under “the state”, ie state departments, to bodies existing on the fringes of “the state”, such as state owned enterprises. It is just as difficult to determine which of these bodies are subject to public law regulation under a comprehensive public law approach as under the classification approach.<sup>243</sup> This problem is particularly prevalent in the context of state commercial activity, where the state quite often employs organisational forms that are not typical of the traditional view of “the state” such as companies and various forms of partnerships.<sup>244</sup>

The comprehensive public law approach should perhaps take as wide a view as possible of what is included under “the state” and hence subject to some public law regulation. One may argue that such an extremely wide view and hence inclusive approach would not be problematic in the light of the variable content of the regulation applied under the comprehensive public law approach. The level of judicial scrutiny can thus simply be varied according to the context so that the threshold application question becomes less relevant. This, it was argued above, is indeed one of the major advantages of the comprehensive public law approach. But such a view is itself not without difficulty. Firstly, it remains problematic to identify and apply the factors that motivate either higher or lower levels of scrutiny in a given case. Such an analysis would largely duplicate the application criteria analysis of the classification approach. As a result the comprehensive public law approach would hold no significant advantages over the classification approach since all the problems of the latter approach noted in chapter three will simply resurface at a later stage of the analysis. Secondly, such a wide view potentially undermines the very existence of a comprehensive public law approach since it may result in the (near) universal application of public law regulation. This result flows from the fact that it is very difficult to exclude any and all state involvement in most private enterprises. Put differently, if one

---

<sup>243</sup> See chapter three at par 3.1.2 above for a discussion of the difficulties in determining what constitute “organs of state” in South African law.

<sup>244</sup> Arrowsmith, Linarelli & Wallace *Regulating Public Procurement* 323 *et seq.*

attempts to avoid all classification and hence include in the ambit of “the state”, for regulatory purposes, all enterprises that show some state involvement, very few truly private enterprises will remain. One would then have to include under public regulation all ventures in which the state has some form of interest, irrespective of how small that stake may be; all enterprises benefiting from some form of tax relief under various tax linked government incentive schemes; all beneficiaries of state subsidies or grants; generally, all enterprises that have received any form of state support. Any other view would require one to adopt some arbitrary classification approach. It is apparent that such a wide view of “the state” extends the ambit of public law regulation too far. It eventually results in the collapse of the argument for special regulatory treatment of state institutions premised on distinct regulatory concerns regarding the state.

This problem illustrates the fact that one cannot really escape the classification dilemma. Even under the comprehensive public law approach, that applies public law rules to *all* instances of public contracting classification questions still remain in the form of what to include in public contracting and what to exclude.

## **7 Conclusion**

The comprehensive public law approach allows courts to apply public and private law regulation to state commercial activity without forcing them to choose between the two sets of rules in a given case. The approach rather allows for the cumulative application of public and private law rules, with the former as the senior partner. It is thus an approach that recognises state commercial activity as both private and public action.

The central advantage of a comprehensive public law approach is that it recognises the distinctive characteristics of state commercial activity as its point of departure. It focuses regulatory attention on those aspects of state commercial activity that set such action apart from analogous private conduct, while maintaining equivalent regulatory control over those aspects that the state version has in common with private conduct. This approach is superior to the ones discussed in the previous two chapters since it allows courts to

focus on appropriate substantive responses to the regulatory questions that emerge in this context rather than getting bogged down in formalistic application analyses on what set of rules to apply.

The comprehensive public law approach's emphasis on the uniquely public character of state commercial activity is also more faithful to the Constitution's vision of a new South African society and hence serves constitutional transformation in South Africa. This strength functions on at least two levels. The comprehensive public law approach exposes the regulatory role of courts as substantive participants in state commercial activity and highly political, not simply as neutral and objective sideline referees. Political questions such as the proper relationship between the executive and courts in this context are brought in the open. Consequently, a culture of justification true to the values of transparency, accountability and participation in the judicial process is fostered. On a second level and with reference to the regulated activity, state commercial action, the comprehensive public law approach insists on constant justification, thereby promoting basic constitutional values such as transparency, participation and accountability. This is of critical importance in breaking with our past of bureaucratic secrecy and exclusion. Following any other approach would amount to the intolerable continuation of at least one sphere where state action is shielded from public scrutiny and where the cloak of secrecy characteristic of the apartheid era remains wrapped around unaccountable exercises of administrative discretion.<sup>245</sup> Such alternatives would clearly be out of line with transformative constitutionalism.

The potential of the comprehensive public law approach in serving constitutional transformation in South Africa is not limited to the way in which it opens up public debate on state conduct (both in executive and judicial form). It can also play an important role in transforming private institutions

---

<sup>245</sup> Anne Davies makes a similar argument in English law, when she states: "A tighter legal regime cannot address many of the political objections to contractualisation. But the law could do much more to ensure that contracts are not simply an area of unaccountable discretionary power for the government": Davies in Freedland & Auby (eds) *The Public Law/Private Law Divide* 129.

towards the Constitution's vision of society. The close analogy between state commercial activity and private commercial activity in the nature of the action creates a bridge across which the public law mechanisms applied in the former instance under a comprehensive public law approach can be transferred to the latter. This transfer is facilitated by the comprehensive public law approach in the way in which it acknowledges the private quality of state commercial activity by maintaining private law regulation, in other words by not simply displacing private law regulation with public law regulation. This approach thus develops and illustrates the coherent combined application of public and private law rules, opening up the way for such application generally.

There is, however, a danger of a negative feedback loop developing from this interaction between the regulation of analogous public and private conduct. While the advantage of the comprehensive public law approach noted above lies in the potential flow of public law values to the private sphere, hence moving towards the recognition that all power, public and private, should be subject to minimum levels of constitutional control, such flow can also loop back to the public sphere with resultant feedback of private values to the public domain. The danger is that values of private commercial dealings, hard bargaining, high levels of confidentiality, self-interested opportunistic behaviour, may seep into public administration, initially in relation to the state's actions in the market, but with resultant progression to other areas of the public domain as well. The long-term result, as Aronson notes, may just be that "judicial or legal values of the administrative lawyer would be infiltrated by the economic and managerial values of the primary decision makers [induced by the influence of the private market]." <sup>246</sup>

There are other dangers inherent in a comprehensive public law approach as well. Most notable is the potential impact on government efficiency. While the flexibility or variability of the content of public law rules may go a long way towards reducing the burden that a comprehensive public law approach would place on the state, that burden remains significant. The

---

<sup>246</sup> Aronson in Taggart (ed) *The Province of Administrative Law* 51.

analysis above shows that the mere availability of public law remedies, in particular judicial review, has considerable efficiency and effectiveness implications. These implications cannot be countered by the flexibility of the *content* of public law rules. It may be that these efficiency implications simply represent the cost of realising public law values and furthering constitutional transformation in South Africa and should hence not be viewed as a problem. However, given the general importance of efficient and effective state administration in achieving transformation goals in South Africa, as well as the express endorsement of administrative efficiency and effectiveness as constitutional imperatives, these “costs” require our serious attention in fashioning an appropriate judicial approach to the regulation of state commercial activity. They cannot simply be rejected as inevitable by-products of constitutional transformation.

Another problem with a comprehensive public law approach is that it does not completely escape classification questions. Even though this approach does not distinguish between different types of state conduct, it is still based on the basic private-public distinction. Accordingly, the need remains to isolate public action from private action. In fulfilling that need many of the problems of the classification approach discussed in chapter three re-emerge. In order to overcome this dilemma public law must be applied so widely that it essentially captures all or at least the bulk of what is currently considered part of the private domain.

Both the problem of inefficiency and the dilemma of avoiding problematic classification issues that emerge under a comprehensive public law approach highlight a need to restrict the availability of public law remedies, in particular judicial review. The analysis of the comprehensive public law approach suggests that it is not enough to simply take a wide and comprehensive view of what rules to apply linked to high levels of flexibility in the content of those rules, or at least the more onerous ones. More work is required. This insight suggests that the comprehensive public law approach is not perfect either. However, this approach aligns well at a fundamental level with the most foundational constitutional values in South Africa and hence facilitates constitutional transformation. It seems therefore that embracing a

comprehensive public law approach is an important first step towards the creation of an optimal approach to the judicial regulation of state commercial activity. But it can only be the first step. Once this first step has been taken the real work begins to shape the appropriate constitutional and political relationship between the courts and administration. The same sentiment is echoed in the recognition of the adverse efficiency implications of a comprehensive public law approach – it confirms that judicial regulation must be cut down so as not to stifle the administration. A comprehensive public law approach thus provides the widest possible starting point from which the ambit of judicial involvement can be reduced on good reason.<sup>247</sup>

It seems therefore that adopting a comprehensive public law approach is a foundational step towards the development of a coherent system of judicial regulation of state commercial activity. The rest of the regulatory building must still be constructed on that foundation and the characteristics and implications of a comprehensive public law approach noted in this chapter should be kept in mind as important specifications of that building. Questions of judicial deference, the political nature of the courts' role in state commercial activity, efficiency implications and the relevance of courts' response to state commercial activity within the broader framework of constitutional

---

<sup>247</sup> This approach to fashioning a system of judicial controls is in line with Van der Walt & Botha's view of an appropriate method of constitutional adjudication within a culture of justification that "instead of *defining* the rights entrenched in the Bill of Rights in an abstract way ... would *delimit* these rights with reference to the exigencies of a particular socio-economic context": Van der Walt & Botha (2000) 7 *Constellations* 341 at 355. If this is an appropriate approach for the courts to take when exercising their constitutional functions, it should also be an appropriate approach to take in defining how the courts are to approach their function in the first instance, ie in setting up the structure of the courts' function.

transformation, both in relation to the achievement of transformation goals and theoretical alignment of the adopted approach to the Constitution's vision of a transformed society, should all be carefully considered when the details of the regulatory approach is worked out. In the next chapter I consider various ways in which such an exercise can be approached.



## **CHAPTER SIX**

### **COMBINED PUBLIC/PRIVATE LAW REGULATION**

#### **1 Introduction**

My analysis in the previous three chapters suggested that a combined public/private law approach holds the promise of achieving the most effective judicial regulation of state commercial activity. Such an approach should in any given case ideally draw on both public and private law rules. However, it should also refrain from unduly hampering state commercial dealings by imposing a too high regulatory burden. In essence, the ideal combined approach should generate a synergy between the control functions of public law rules and the facilitating functions of private law rules.

However, the preceding discussion also indicates that such a combined approach does not currently exist in South African law. It is neither to be found in the current classification approach of South African courts nor in the available alternatives of an exclusively private law approach or a comprehensive public law approach. The question thus emerges of how to fashion such a combined approach. In this chapter I suggest potential avenues towards such development. The analysis here will not go much beyond suggesting potential routes to the creation of an effective combined approach. I believe that each of these options warrants a study on its own and any detailed treatment of them here will certainly extend the scope of this study beyond reasonable limits. My purpose is thus not exhaustively to investigate alternative ways of developing a new approach to the judicial regulation of state commercial activity in South Africa, but simply to put forward ways for future work to be done in this area.

I focus on two potential avenues of development. Firstly, I assess the desirability of creating a specialised body of law dealing with government contracting: a separate law of public contract. Secondly, I suggest an approach that regulates state contracting on a continuum between exclusively private law regulation and comprehensive (or full-scale) public law regulation. My assessment of the relative advantages and disadvantages of these two

alternative approaches suggests that the continuum approach holds the most promise.

## **2 A specialised branch of government contract law**

In common law systems government contracting is traditionally governed by the usual rules of (private) contract law rather than a specialised branch of law aimed specifically at state commercial activity, undoubtedly under Diceyan influence. In contrast to many Continental European systems, such as those of Germany and France, no “government contract law” or “public contract law” thus developed in common law systems.<sup>1</sup> The same is true of the South African legal system where no separate law of state contracting exists. However, the recognition of the peculiar legal problems arising from state contracting has over an extended period of time motivated scholars to argue for the creation of such a specialised branch of law in common law systems.<sup>2</sup> Such an approach to the regulation of state commercial activity is therefore no novel suggestion. In this section I focus on only two questions regarding this approach. Firstly, can a separate branch of government contract law be judicially developed in South African law? And secondly, what are the relative advantages and disadvantages of such an approach?

### **2.1 Judicial development of a distinct branch of law**

In the absence of an existing branch of government contract law the viability of such an approach to the judicial regulation of state commercial activity

---

<sup>1</sup> Turpin *Government Procurement and Contracts* 101; Arrowsmith (1990) 106 *LQR* 277, *Civil Liability and Public Authorities* 1, 5; Hogg *Liability of the Crown* 118; Harden *The Contracting State* 37; De Smith, Woolf & Jowell *Judicial Review of Administrative Action* 173.

<sup>2</sup> Early advocates of separate treatment of government contracts are JDB Mitchell, H Street and Alan W Mewett: Mitchell (1951) 63 *Juridical Review* 60, (1952) 9 *University of Toronto LJ* 194, *The Contracts of Public Authorities* 22 – 23, 226, 240 – 244; Street *Governmental Liability* chapter 3; Mewett (1959) 5 *McGill LJ* 222; see also Arrowsmith *Government Procurement and Judicial Review* 5 – 7. More recently, scholars such as Colin Turpin and Anne CL Davies have argued for a separate law of public contract: Turpin *Government Procurement and Contracts* 114, *Government Contracts* 99-100; Davies in Freedland & Auby (eds) *The Public Law/Private Law Divide* 113, (2006) 122 *LQR* 98, *Accountability* 198 – 207.

depends on the question whether a separate or distinct branch of government contract law can be judicially created. Such development is indeed possible, an example of which is to be found in French law.

### 2.1.1 The French example

The premier example of the judicial development of a distinct body of law governing state contracts emerges from French law. In contrast to modern German law, where the general law pertaining to public contracts (*öffentlichrechtlicher Vertrag*) is statutorily codified,<sup>3</sup> much of the law governing French public contracts (*contrats administratifs*) remains a judicial product.<sup>4</sup>

The particular version of the separation of powers doctrine in French law seemingly influenced the development of a separate legal figure of government contract from an early stage. Because of the fact that the ordinary courts are prohibited from interfering with executive action, based on

---

<sup>3</sup> VwVfG §§ 54 – 62.

<sup>4</sup> Brown & Bell *French Administrative Law* 141, 202 *et seq*; Mitchell *The Contracts of Public Authorities* 165, 167, 171; Arnould (2001) 10 *Public Procurement LR* 324 at 336; Autexier (1993) 52 *VVDStRL* 285. It should be noted, however, that the special rules pertaining to public procurement procedures have been codified in France since 1964 (in the *Code des marchés publics*) with more recent codes adopted in 2001, 2004 and 2006 under increasing influence of the EC directives on public procurement, see Arnould (2004) 13 *Public Procurement LR* NA6, (2001) 10 *Public Procurement LR* 324; Brown & Bell *French Administrative Law* 205 – 206. However, case law suggests that the mere application of the 1964 *Code des marchés publics* to a particular state contract does not result in such a contract being a *contrat administratif* rather than a *contrat privé*, see Martin (1997) 6 *Public Procurement LR* CS166. When I am referring to the distinct rules of French law constituting the law of government contracts I am thus only referring to those judicially crafted rules of administrative law that apply exclusively to *contrats administratifs* in general and in particular the rules governing performance under such contracts, which do not include the *Code des marchés publics*. Even in those instances where specific statutory rules, flowing from the *Code des marchés publics*, apply to specific *contrats administratifs*, specialised (judicially crafted) rules may still come into play in the interpretation of the terms of government contracts, see Brown & Bell *French Administrative Law* 206. The mere existence of the *Code*

the French view of separation of powers,<sup>5</sup> the use of ordinary civil law contracts by the executive becomes problematic. If ordinary courts are prohibited from ordering the executive to act in a specific manner<sup>6</sup> or even to scrutinise executive actions in exercising public functions, the use of contract as a legal vehicle to perform such public functions is greatly undermined. From a pragmatic point of view it is difficult to see the use of concluding a contract if the obligations under the contract cannot be legally enforced. This prompted the need to develop a distinct legal figure that would allow the state to act with the consensual cooperation of a private counterparty in fulfilling public functions,<sup>7</sup> but would also allow judicial scrutiny of such action and in particular the enforcement of the arrangement against the state party. Since responsibility for performance of public functions could only be assessed in terms of administrative law by administrative courts the legal figure of *contrat administratif* consequently emerged.<sup>8</sup> However, the mere recognition of a legal figure approaching contractual form, but forming part of administrative

---

*des marchés publics* therefore does not displace the existence and continued use and development of a distinct general law of government contract in France.

<sup>5</sup> The Law of 16 – 24 August 1790 states: “It shall be a criminal offence for judges in the civil courts to concern themselves in any manner whatsoever with the operation of the administrators, nor shall they call administrators to account before them in respect of the exercise of their official functions,” Brown & Bell *French Administrative Law* 127 – 128. See also Erh-Soon Tay & Kamenka in Benn & Gaus (eds) *Public and Private in Social Life* 74 and chapter one at par 4.3.3 above.

<sup>6</sup> This was largely the effect of one of the earliest criteria used in France to distinguish between the jurisdictions of the ordinary (civil) courts and the administrative courts, viz that of the state as debtor (*l'Etat débiteur*). This criterion held that only the administrative courts had jurisdiction to order the state to make any money payments. Many contractual disputes involving the state accordingly fell within the exclusive jurisdiction of the administrative courts. See Brown & Bell *French Administrative Law* 129.

<sup>7</sup> Underlying this need is of course the desire of the executive to adopt such cooperative means of performing public functions, which seems to have been a factual reality in the development of *contrats administratifs*. See Brown & Bell *French Administrative Law* 203 where the authors note the continued use of contract in France to structure relationships between different government entities and levels of government as “an important aspect of political strategy.”

law, does not amount to a separate branch of law in relation to a distinct legal figure.<sup>9</sup> To understand the development of such distinct government contract rules in French law one has to further note the separate judicial jurisdictions in the French legal system.

As noted in chapter one,<sup>10</sup> functionally separate judicial jurisdictions dealing with administrative and (ordinary) civil law matters respectively exist in French law. It seems that the existence of the separate administrative law jurisdiction played a critical role in the development of a distinct body of law dealing with government contracts.<sup>11</sup> Once the administrative courts started adjudicating disputes over *contrats administratifs* they steadily departed from the ordinary rules of contract law, found in the *Code Civil*, to accommodate specific and unique features of state involvement in the contractual arrangements.<sup>12</sup> One such feature, which played a critical role in the recognition of the distinct figure of the *contrat administratif* and accordingly the classification of specific contracts as administrative rather than civil, is the public interest served by *contrats administratifs*.<sup>13</sup> Mitchell argues that it is the heightened awareness of the public interest dimension of state administration linked to a higher competence in balancing such interest against individual rights that steered French administrative courts to develop distinct rules tailored to the specific conditions of government contracting.<sup>14</sup> Over an extended period of time French administrative courts accordingly developed a distinct body of law dealing exclusively with administrative contracts.

---

<sup>8</sup> Mitchell *The Contracts of Public Authorities* 169. See also Floyd *Die Owerheidsooreenkoms – 'n Administratiefregtelike Ondersoek* 57.

<sup>9</sup> See Duguit's criticism of the recognition of a distinct concept of *contrat administratif* discussed by Mitchell *The Contracts of Public Authorities* 168 and Mewett (1959) 5 *McGill LJ* 222 at 222 – 223.

<sup>10</sup> At par 4.3.3.

<sup>11</sup> Mitchell *The Contracts of Public Authorities* 164 – 165.

<sup>12</sup> Mitchell *The Contracts of Public Authorities* 165, 182.

<sup>13</sup> Mitchell *The Contracts of Public Authorities* 182; Brown & Bell *French Administrative Law* 203; Mewett (1959) 5 *McGill LJ* 222 at 223 – 226.

<sup>14</sup> Mitchell *The Contracts of Public Authorities* 165 – 166, 182.

### 2.1.2 Impetus for judicial development

The impetus for the judicial development of a distinct branch of government contract law in France had both substantive and procedural dimensions. Substantively it was the recognition of the unique features of (instances of) government contracting, in particular the public interest inherent in such activity, that motivated the need for distinct rules. However, it seems that the separate judicial jurisdictions linked to a particular constitutional view of separation of state powers largely generated the actual development of such specialised and distinct rules. As a result the French example does not easily transplant to the South African context with its single judicial jurisdiction. The analogous recognition of unique dimensions to state contracting in South African law<sup>15</sup> will arguably not be enough to trigger similar judicial development.

Mitchell, however, argues that the “peculiar characteristics of French law have merely facilitated or accelerated” the development of the distinct rules pertaining to *contrats administratifs* “without making the acceptance of the conclusions reached dependent upon the acceptance of the French legal system in its entirety,” in particular “the adoption of the French system of a separate administrative jurisdiction.”<sup>16</sup> The question is what other impetuses can stimulate a similar development in South African law. Again Mitchell provides some guidance when he notes in relation to the development in French law:

[T]he whole body of [administrative contract] rules demonstrates that if once the contracts of public authorities are regarded as a special class of contract, it is much easier to develop rules appropriate to the requirements of the whole situation in which those contracts are made, making allowance both for the object

---

<sup>15</sup> See chapter three at par 3.3 and par 3.5 above, where I noted the similarities between the substantive features of state contracting that warrant classification of such contracts as *contrats administratifs* in French law and the application of public law rules in South African law. Particularly relevant here are the public interest in state contracting, the fulfilment of a public function and the use of state power.

<sup>16</sup> Mitchell *The Contracts of Public Authorities* 164.

of the contract and for the character and legal situation of the parties making it.<sup>17</sup>

In chapter four<sup>18</sup> I argued in respect of the exclusively private law approach that a number of general contract law rules could effectively regulate many of the concerns particular to state commercial activity. However, I also argued that further development is required for such general rules to achieve the desired level of regulation. In this respect Mitchell's remarks above become important. The recognition of state contracts as "a special class of contract" may just be the necessary impetus to advance the development of existing contract law rules towards such higher levels of regulation and eventually a distinct body of government contract law.<sup>19</sup> It is thus not necessary to have a separate system of administrative law or public law courts to achieve the development of a distinct body of government contract law. A similar result may be achieved by the mere recognition of state contracts as a specific class of contract by ordinary courts and the development of existing contract law doctrine in relation to that specific class of contract.

Such recognition and resultant development will, however, not be easily achieved. Mitchell warns that the French "development has ... only been possible by making fundamental changes in the generally accepted rules of contract."<sup>20</sup> Turpin echoes this sentiment when he states in relation to English law that the need to develop a distinct body of government contract law "is

---

<sup>17</sup> Mitchell *The Contracts of Public Authorities* 215.

<sup>18</sup> See chapter four at par 2.2 and par 6 above.

<sup>19</sup> See also Davies in Freedland & Auby (eds) *The Public Law/Private Law Divide* 126.

<sup>20</sup> Mitchell *The Contracts of Public Authorities* 215. See also Mewett (1959) 5 *McGill LJ* 222 at 241, who argues that the common law contract is unsuited for such a development since common law knows only one conception of contract and does not possess the mechanisms to develop such high level of differentiation within that single conception. He specifically notes that principles within existing contract law doctrine, such as public policy, which may hold promise towards the development of distinct rules governing public contracts are at best "disabling concepts" and not "enabling concepts" that can only provide escape from liability and cannot generate the distinctive positive rights and duties found in French administrative contract law. For similar criticism of the common law doctrine of frustration as of only limited use in this regard, see Mitchell *The Contracts of Public Authorities* 228.

unlikely to be met by judicial law-making, partly because of a rather strongly entrenched judicial adherence to orthodox principles.”<sup>21</sup> As I noted in chapter four the same is true of South African courts.<sup>22</sup>

However, I also argued in chapter four that the Constitution creates a new impetus for the further development of contract law rules in the specific context of state contracting. Specific provisions of the Constitution<sup>23</sup> can be applied to distinguish state contracts from other (private) contracts, thereby establishing a specific class of contract and to guide the development of the specific rules that apply to such contracts.

### **2.1.3 Methodology of judicial development**

#### **2.1.3.1 The traditional *essentialia* model**

Even if one accepts the existence of both substantive<sup>24</sup> and formal<sup>25</sup> stimuli for the judicial development of a distinct law of government contracts in South Africa along the lines discussed in par 2.1.2 above, the traditional methodology applied to identify specific classes of contract remains a potential problem. This traditional approach is to identify the essential elements of a particular class of contract (the *essentialia*) and to contrast that set of elements with the *essentialia* of other classes of contract.<sup>26</sup> Tjakie Naudé says of this approach:

The *essentialia-naturalia* approach to classification can be described as “conceptual”, as the question whether the contract can be classified as a particular type of contract is determined

---

<sup>21</sup> Turpin *Government Contracts* 100.

<sup>22</sup> See par 2.2.

<sup>23</sup> Eg Constitution s 195, s 217.

<sup>24</sup> In the form of the unique features of state contracting.

<sup>25</sup> In the form of specific provisions of the Constitution aimed specifically at state contracting.

<sup>26</sup> Naudé 2003 *TSAR* 411; Van der Merwe *et al Contract: General Principles* 260; Van Rensburg, Lotz & Van Rhijn (updated by Sharrock) in Joubert (ed) *The Law of South Africa* vol 5(1) (second edition) par 184; Lubbe & Murray *Farlam & Hathaway Contract* 416; Joubert 1989 *TSAR* 568 at 576.



exclusively with reference to a closed number of elements making up the concept.<sup>27</sup>

She goes on to subject the traditional approach to stringent criticism, which is of particular relevance here. It is extremely difficult, if not impossible, to identify the required closed list of elements constituting the *essentialia* of state contracts. State contracts are arguably of such a varied nature that it is not feasible to isolate a comprehensive and exclusive list of elements encompassing all, but only those, contracts. In terms of the *essentialia* approach the failure to construct such a list would undermine the recognition of a separate class of state contracts.

In any attempt to capture the entire field of state contracting within a single class there is a danger that the *essentialia* may be formulated so widely that “it may lead to injustice because inappropriate norms may be applied to some of the wide variety of transactions that may be covered by a single contract type.”<sup>28</sup> This danger highlights another problem of the *essentialia* model, namely that it tends to obscure “further differentiation” between contracts within the same class that differ in significant respects.<sup>29</sup> While these differences may not be in respect of essential elements of the relevant contracts they are still of such a nature that differentiated legal treatment is required. In the present context this problem has two dimensions. Firstly, state contracts often share *essentialia* with ordinary private contracts (sale, lease, etc), with only the identity of one party as the obvious difference. That identity does not constitute an essential element of the contract with the result that it is extremely difficult to distinguish such contracts from analogous ordinary private contracts under an *essentialia* approach. Secondly, state contracts differ vastly *inter se* so that a single grouping of such contracts may not be sufficient to fashion specific rules governing particular instances of state contracting. A final potential problem with the *essentialia* model generally

---

<sup>27</sup> Naudé 2003 TSAR 411. See also the more detailed treatment of this topic in her doctoral dissertation: *The Legal Nature of Preference Contracts* 239 – 262.

<sup>28</sup> Naudé 2003 TSAR 411 at 412.

<sup>29</sup> Naudé 2003 TSAR 411 at 417.

is a too wide definition of the contractual end as the major premise of classification, coupled with *naturalia* which reflect only one possible manner in which parties may intend to realise that end. This would result in the imposition of inappropriate *naturalia* upon parties whose precise purpose may merit separate treatment.<sup>30</sup>

This problem is particularly acute in relation to state contracts. The “contractual end” or “the purpose of the contract, that is, the most important result”<sup>31</sup> of state contracts, stated in a manner that will cover the entire spectrum of state contracts in order to construct a single class, must be the public interest, or put differently, public service. Apart from the difficulty in formulating any precise (abstract) description of what the public interest is in order to fashion specialised rules to apply to that subset of contracts, such a formulation of the “contractual end” is far too wide to be of any real use. Furthermore, such an approach would greatly reduce flexibility in the exact manner in which the state engages in commercial activity in different contexts, by attempting to formulate a specific set of rules to govern all such instances from a highly general and abstract purposive perspective. In the final analysis Naudé criticises the traditional approach to the classification of types of contracts as “an unrealistic and unacceptable doctrinal straitjacket on the development of new *ex lege* terms,” especially “where this is required by policy but where the determinants of their applicability cannot be formulated in terms of *essentialia*.”<sup>32</sup> Since state contracts fall within this latter instance the traditional methodology of local courts to the recognition of specific types of contract poses a significant obstacle to the development of a distinct body of government contract law in South Africa.

### **2.1.3.2 The alternative *Typenlehre* model**

Naudé, however, also suggests a way out of this dilemma. She argues that recourse to the German model of *Typenlehre* as an additional approach to the

---

<sup>30</sup> Naudé 2003 *TSAR* 411 at 418.

<sup>31</sup> Naudé 2003 *TSAR* 411.

recognition of specific types of contract is useful.<sup>33</sup> The *Typenlehre* model views separate classes of contract not in sharp conceptual terms, as the *essentialia* model does, but much more flexibly as types that share certain characteristics to a greater or lesser degree, which merit particular legal treatment also to a greater or lesser degree.<sup>34</sup> The characteristics of the types of contract do not have to be as precisely formulated as elements constituting *essentialia* and the classification of a specific contract is done in a contextual manner taking the entire transaction into account.<sup>35</sup> Such an approach has significant advantages over the *essentialia* methodology. In particular, it allows one to escape the “all-or-nothing” results of conceptual reasoning and provides for a much more subtle and flexible approach that is responsive to the individual incidents of a given case. Naudé argues that a *Typenlehre* model is not foreign to South African law and that such a typological method can be discerned in local courts’ treatment of a number of specific contracts.<sup>36</sup>

The methodology suggested by Naudé, drawing upon the German *Typenlehre*, can be applied in the context of a distinct branch of state contract law. It should already be evident that the *Typenlehre* model largely solves the

---

<sup>32</sup> Naudé 2003 TSAR 411 at 421.

<sup>33</sup> Naudé 2003 TSAR 411 at 421 *et seq.*

<sup>34</sup> Naudé 2003 TSAR 411 at 425. See also Joubert 1989 TSAR 568 at 577. This approach corresponds with Henk Botha’s arguments regarding the more complex view of categorisation that has emerged in recent years: Botha 2002 TSAR 612 at 619 – 620. Especially the insights of studies in cognitive psychology noted by Botha and linked to Wittgenstein’s notion of “family resemblances” in categorisation seem particularly relevant here: “[C]ategories generally have best examples or *prototypes*, that is examples that are commonly regarded as more representative of the category than others. For example, robins and sparrows are typically identified as prototypical birds; owls, penguins and ostriches, although birds, are not viewed as prototypical. Prototypes play an important role in judgments of similarity: objects that are not viewed as central to or prototypical of a particular category may nevertheless be seen as members of the category by virtue of ‘family resemblances’ to the prototype” (footnotes omitted). Botha further notes that “variations or extensions [on the prototype] cannot be predicted by general rules, but are experientially motivated and culturally defined ... Context and purpose are central to categorisation.”

<sup>35</sup> Naudé 2003 TSAR 411 at 425. See also Joubert 1989 TSAR 568 at 577.

<sup>36</sup> Naudé 2003 TSAR 411 at 425 – 427. See also Joubert 1989 TSAR 568 at 578 – 579.

problems of the *essentialia* approach in the context of state contracting. Accordingly, in terms of this alternative approach methodology should no longer be a deterrent to the judicial development of a distinct branch of state contract law. The value of Naudé's suggested approach is that it goes beyond the mere classification (or application) question in that it also speaks to the extent to which the particular rules apply. Put differently, this methodology does not only determine the type of the contract, but also the degree to which that particular contract should be subjected to the rules applicable to the contract type. Many of the regulatory concerns that infuse the current classification approach of South African courts discussed in chapter three can function as characteristics of state contracts as a specific type of contract. Under the methodology suggested by Naudé, those regulatory concerns will not only determine whether a particular instance of state commercial activity should be treated as a state (administrative) contract, but also the degree to which state contract law should apply to the matter at hand.

#### **2.1.4 Nodes of development other than the law of contract**

Although the law of contract provides the most obvious and promising point of departure for the judicial development of a distinct branch of government contract law it is not the only node within South African law from which courts can fashion such a distinct branch of law. Other private law fields such as the law of delict and enrichment may provide additional routes to such development. For example, Anne Davies notes the advantages brought about by the statutory mechanisms created in English law to solve *ultra vires* problems in public contracting.<sup>37</sup> She argues that these statutory provisions force public authorities to ascertain in advance whether they have the power to enter into a particular transaction in a manner that would not be the case under normal contract law rules.<sup>38</sup> This same distinct legal treatment of state contracting may be achieved via common law development in South Africa, using the law of delict. In terms of their capacity to recognise delictual liability

---

<sup>37</sup> Davies in Freedland & Auby (eds) *The Public Law/Private Law Divide* 115 – 116.

<sup>38</sup> Davies in Freedland & Auby (eds) *The Public Law/Private Law Divide* 116.

in specific instances, South African courts can place *ultra vires* risks in state contracting on the state. When the state is saddled with delictual liability for the losses suffered by the counterparty because of the invalidity of a public contract on *ultra vires* grounds, incentives similar to those statutorily generated in England are created for a public authority to scrutinise its power to enter into the transaction in advance. That South African courts are able (as opposed to willing) to bring about such development is illustrated by the judgment in *Steenkamp NO v Provincial Tender Board, Eastern Cape*.<sup>39</sup>

A distinct branch of government contract law can arguably also develop via administrative law.<sup>40</sup> Wiechers has long recognised consensual state conduct as a distinct category of administrative action in South Africa.<sup>41</sup> The rules governing this category of “multilateral administrative acts”<sup>42</sup> may be further developed to eventually constitute a law of administrative agreements.<sup>43</sup> However, it is highly doubtful whether a complete branch of

---

<sup>39</sup> 2006 3 SA 151 (SCA).

<sup>40</sup> In German law, especially Apelt, in contrast to most other German authors, argued for the development of the *verwaltungsrechtlicher Vertrag* from an administrative law perspective rather than from the existing private law of contract: Apelt *Der verwaltungsrechtliche Vertrag* 20, 21 – 58; Floyd *Die Owerheidsooreenkoms – ‘n Administratiefregtelike Ondersoek* 60. That the existing civil law of contract eventually served as the basis of the *verwaltungsrechtlicher Vertrag* is clear from *VwVfG* § 62, which applies the general contract law provisions found in the *BGB* to administrative contracts to the extent that those general rules are appropriate in the administrative context. See also Jarass (1981) 34 *DÖV* 813 at 820, who describes the *verwaltungsrechtlicher Vertrag* as “ein privatrechtliches Institut mit öffentlich-rechtlichem Etikett” (a private law institution with a public law label (my translation)).

<sup>41</sup> Wiechers *Administratiefreg* 129.

<sup>42</sup> Burns & Beukes *Administrative Law under the 1996 Constitution* 167.

<sup>43</sup> Wiechers and a number of subsequent authors have argued that there exists in South Africa a legal concept that can be called an administrative agreement, which is distinct from a private law contract. Examples are said to be employment contracts of civil servants and concession agreements. None of these authors, however, seems to argue that there exists a distinct branch of law governing such administrative agreements. Floyd in fact expressly states that administrative agreements are not known to South African courts or the legislature: *Die Owerheidsooreenkoms – ‘n Administratiefregtelike Ondersoek* 345. At most these authors argue that both administrative law and the ordinary law of contract apply to what may *de facto* be described as administrative agreements. See Wiechers *Administratiefreg* 129 *et*

government contract law will ever develop along this route. Especially in a commercial context the well developed appropriate forms of private law will always simply present much more sophisticated legal mechanisms than anything public law has to offer.<sup>44</sup> As a result any development of a distinct branch of government contract law, even from within public law, will always rely heavily on existing private law doctrine. Furthermore, development via administrative law will at most result in a comprehensive public law approach rather than a distinct branch of government contract law. The former is the approach discussed in chapter five, where public law is simply superimposed on private law to constitute a comprehensive public law approach to the regulation of state commercial activity. In contrast, a distinct branch of public contract law, which is the approach discussed here, suggests a much more nuanced and integrated approach where specific rules are *developed* to govern a distinct legal concept, namely public contract. This suggested development goes much further than the approach discussed in chapter five in creating a new and distinct legal treatment of state commercial activity.

In the light of these diverse nodes of potential development of a distinct branch of government contract law it may be more appropriate to refer to a distinct branch of state or public commercial law than the narrower law of state or government contract. However, the discussion of the alternative nodes of development also seems to suggest that existing contract law will always remain the senior partner in any such development.

## **2.2 Advantages and disadvantages of a separate branch of law**

### **2.2.1 Special focus on the unique features of state contracting**

One of the main advantages of a distinct branch of government contract law is the special attention it affords to the unique features of state contracting. Courts therefore do not have to ignore or deny the peculiar characteristics of

---

*seq*; Floyd *Die Owerheidsooreenkoms – 'n Administratiefregtelike Ondersoek* 345 – 350, 405 *et seq*; Burns & Beukes *Administrative Law under the 1996 Constitution* 167 *et seq*.

<sup>44</sup> This is one of the main reasons advanced in German law for the use of private law forms by the state: Ehlers (1990) 45 JZ 1089 at 1092, 1094; Bullinger *Vertrag und Verwaltungsakt* 91; Floyd *Die Owerheidsooreenkoms – 'n Administratiefregtelike Ondersoek* 64.

state contracting and do not have to equate the state with private commercial players in order to take advantage of the strengths of contract law, such as the attainment of high levels of efficiency and reflexivity.

Mitchell notes that the French model of *contrats administratifs* is attractive because it highlights the public interest dimension to state contracting.<sup>45</sup> It is this unique feature of state contracting that permeates all special rules constituting the French law of administrative contracts.<sup>46</sup> A distinct branch of government contract law hence provides for a much closer balancing of the interests of public service against the interests of the individual counterparty.<sup>47</sup> One outcome of this advantage, also evident in the French model, is that the cost of government is distributed equally amongst members of the society, rather than placing such cost on a single individual, which may result from an application of the ordinary rules of private ordering.<sup>48</sup>

A distinct branch of administrative contracts also has significant conceptual advantages in relation to the unique features of state contracting. Whereas ordinary contract law takes an individualistic view of contracts<sup>49</sup> and “supposes contracting parties to be dealing at arm’s length in exclusive pursuit of their own interests”, a distinct branch of state contract law, such as

---

<sup>45</sup> Mitchell *The Contracts of Public Authorities* 165 – 166, 182.

<sup>46</sup> Mitchell *The Contracts of Public Authorities* 182.

<sup>47</sup> Mitchell *The Contracts of Public Authorities* 166.

<sup>48</sup> This is evident in South African courts’ refusal to extend the delictual liability of the state in cases where a public contract turns out to be invalid because of errors in the awarding process in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) and *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC). See chapter four at par 2.3.2.3 above for a discussion of this case. The result of this refusal is that the private counterparty is forced to bear the cost of the state’s errors, rather than society at large.

<sup>49</sup> See chapter four at par 6 above. See also the analysis of South African contract law by Jaco Barnard *A Critical Legal Argument for Contractual Justice in the South African Law of Contract* 134, 193, who concludes that there is an “individualism/rule bias” in South African contract law and “in the South African law of contract the individualism/rules pole is and remains the privileged or favoured pole of the contract law duality.”

the French example, allows for a much more “collaborative” perspective.<sup>50</sup> This latter perspective is more aligned to the reality of state contracting where the arrangements are often not aimed at the pursuit of the parties’ divergent interests, but rather at the achievement of a single purpose: public service. Such perspective also brings the regulation of state contracting potentially closer to the current constitutional view of the state’s role in society as collective and facilitating in nature. In this way one of the basic criticisms I noted in chapter four<sup>51</sup> of an exclusively private law approach to the regulation of state commercial activity can possibly be moderated.<sup>52</sup>

### **2.2.2 Increased likelihood of normative ordering of public contracting**

Another advantage, which is closely related to the previous one, is that the development of a distinct branch of state contract law as a judicial approach has a much higher chance of introducing increased levels of normative ordering of public contracting than would be the case if ordinary contract law is applied. This advantage lies in the fact that the legal rules applied to state contracts are *separate* from those governing ordinary contracts. Because of the reluctance of South African courts to apply higher levels of normative ideals, such as reasonableness and fairness, to all instances of contracting<sup>53</sup> the application of such ideals to public functions can only be consistently achieved if the state’s commercial activity is separated from analogous private conduct. South African courts are much more likely to directly apply normative values to state contracting if such application can be limited to state conduct. In this manner the separation of public and private commercial activity facilitates higher levels of regulation in the former instance.

---

<sup>50</sup> Turpin *Government Procurement and Contracts* 113 – 114.

<sup>51</sup> See chapter four at par 6 above.

<sup>52</sup> Even if the distinct body of public contract law does not in practice differ substantially from the normal law of contract, which Arrowsmith, Linarelli & Wallace *Regulating Public Procurement* 14 suggest is the case in French law, the conceptual difference between such separate branches of law remains important.

<sup>53</sup> See chapter four at par 2.2 above.



### 2.2.3 Keeping public and private contracting apart

The separation of public and private contracting can, however, also have significant adverse effects. In the previous chapter I argued that the transformation of private relationships towards the culture of justification envisaged by the Constitution is just as important as the alignment of public relationships to that vision.<sup>54</sup> An important potential advantage of applying public and private law rules side-by-side in the context of state commercial activity is therefore the “cross-over” of public law rules and values to the private sector. This advantage can, however, be severely compromised if the regulatory approach to state commercial activity completely severs that context from the parallel private one. If, following the development of a distinct branch of public contract law, state commercial activity is completely isolated from private commercial activity from a regulatory perspective there will be no bridge across which public law values can pass to the private sphere.

However, this disadvantage depends largely on how strictly such a body of law is separated from ordinary contract law. In the French model the separation is rather strict since the two bodies of law are applied by separate judicial jurisdictions. In the South African context the separation may not be so strict. Although distinct branches of law, public and private contract law would still be applied by the same courts in South Africa. This would allow for a fair amount of interaction between the two branches. Furthermore, if a distinct body of public contract law develops in South Africa along the lines suggested in paragraphs 2.1.2 and 2.1.3 above, that is through the recognition of state contracts as a specific class of contract, there will be considerable scope for interaction. Although specialised rules will develop to govern public contracts, such rules remain part of a single system of contract law (albeit with limited application). In this regard Hugh Collins argues:

Once private law embarks on this route of differentiation of contexts of contractual arrangements, it introduces much greater normative complexity into its reasoning processes.<sup>55</sup>

---

<sup>54</sup> See chapter five at par 4.3 above.

<sup>55</sup> Collins *Regulating Contracts* 50.

Thus apart from the application of public law values to specific instances of private contracting or specific rules of (private) contract law, it is this infusion of constitutional values into the basic fabric of private law, its reasoning processes, that will essentially advance constitutional transformation.

#### **2.2.4 Remaining classification problems**

The main problem with the development of a distinct body of law governing state contracts is that much of the classification problems that plague South African courts' current approach remain. Davies notes that "the case for a law of public contracts is ... highly controversial" precisely because its scope of application cannot be specifically determined.<sup>56</sup> She calls this the "most significant objection" to such an approach.<sup>57</sup> The problem is that it seems impossible to clearly and coherently formulate the criteria that should determine whether a particular contract should be governed by public contract law as opposed to private contract law. It is in essence the same problem that underlies the question whether a particular state contract should be subject to administrative or contract law regulation discussed in chapter three. Both French and German law illustrate the classification difficulties that remain pursuant to the development of a distinct body of public contract law. In both systems the question whether a particular contract is subject to that body of law, rather than the general law, is one of tremendous complexity. Accordingly, in both systems extensive jurisprudence has developed around this question.<sup>58</sup> The development of a distinct branch of public contract law

---

<sup>56</sup> Davies in Freedland & Auby (eds) *The Public Law/Private Law Divide* 128 – 129. See also Davies *Accountability* 12, 203 – 205.

<sup>57</sup> Davies in Freedland & Auby (eds) *The Public Law/Private Law Divide* 128.

<sup>58</sup> Brown & Bell *French Administrative Law* 141 – 143, 202; Ehlers in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 130 – 139, 140 – 141; Gurlit in Erichsen & Ehlers (eds) *Allgemeines Verwaltungsrecht* 698 *et seq*; Mitchell *The Contracts of Public Authorities* 171 *et seq*; Turpin in Von Mehren (ed) *International Encyclopedia of Comparative Law Volume VII Contracts in General* 28 – 29; Singh *German Administrative Law in Common Law Perspective* 8 – 10, 197 – 206; Gurlit *Verwaltungsvertrag und Gesetz* 640 *et seq*; Ziekow *Verwaltungsverfahrensgesetz Kommentar* 413 – 415; Floyd *Die Owerheidsooreenkoms – 'n Administratiefregtelike Ondersoek* 72 – 83.

therefore does not seem to take us any further in coming up with a viable judicial approach to the regulation of state commercial activity than the current classification approach does.

A distinct branch of public contract law also does not solve the problems of conceptual and formalistic reasoning associated with the classification approach.<sup>59</sup> In fact creating a distinct *concept* of state contract leads to increased conceptualism and formalism. The objections against reliance on conceptual reasoning and formalism are hence equally, if not more, applicable to this approach than the current classification one. Tjakie Naudé's suggestions regarding the typological methodology in constructing specific classes of contract may temper this disadvantage somewhat. In terms of her suggestion, with reliance on the German *Typenlehre*, specific contracts are not viewed as distinct concepts, but rather as types, which are more flexible than concepts.<sup>60</sup> In considering whether a particular contract fits a specific type value judgments based on the purpose of recognising the particular type and the consequences of such recognition are required.<sup>61</sup> The all-or-nothing formalistic consequences of conceptual reasoning are avoided by recognising that specific contracts may fit a particular type only partially and that the consequences uniquely attached to that type can only partially apply to the specific instance.<sup>62</sup> By keeping the purpose or function of the classification exercise in mind this approach inhibits the slide to formalism.

Similar to the disadvantages of keeping public and private contracting apart, discussed in par 2.2.3 above, the problems associated with classification in the present context seem to depend on how strict the separation between public contract law and ordinary private contract law is. If public contract law is viewed as a strictly separate branch of law, as in the French model, the danger of conceptual thinking and resultant formalism is high since the need exists for a clear concept of public contract. However, if

---

<sup>59</sup> See chapter three at par 4.1 above for criticism of the formalism and conceptualism of the classification approach.

<sup>60</sup> Naudé 2003 *TSAR* 411 at 422 – 425.

<sup>61</sup> Naudé 2003 *TSAR* 411 at 424.

<sup>62</sup> Naudé 2003 *TSAR* 411 at 425.

the separation is not as strict, as might be the case in South African law following development along the lines discussed in paragraphs 2.1.2 and 2.1.3 above, the danger of conceptualism leading to formalism seems less acute.

### **2.2.5 Limited combination of private and public law**

Apart from the specific disadvantages of a distinct branch of public contract law as regulatory approach noted above, there is a fundamental drawback to this approach in the way any such development is likely to progress in South African law. The problem is that such a distinct branch of law, based on the recognition of state contracts as a specific class of contract, largely remains a private law approach. Consequently, the fundamental problems with an exclusively private law approach, as highlighted in chapter four, essentially remain applicable.

It is furthermore highly questionable whether it would ever be possible within South African law, given the framework available for such judicial development,<sup>63</sup> to make the fundamental changes to basic contract law doctrine or specific rules to create a meaningful and satisfactory law of public contract analogous to the French example. Development within contract law doctrine would arguable never adequately depart from fundamental contract law notions to the extent required for the successful creation of a distinct branch of public contract law.<sup>64</sup> Alan Mewett's argument that the common law conception of contract is probably too narrow to allow for the development of a public contract that fundamentally differs from an ordinary private law contract seems particularly apt here.<sup>65</sup> He notes that the *contrat administratif*

---

<sup>63</sup> See paragraphs 2.1.2 and 2.1.3 above.

<sup>64</sup> See Mitchell *The Contracts of Public Authorities* 215, where he states that the French "development has ... only been possible by making fundamental changes in the generally accepted rules of contract."

<sup>65</sup> Mewett (1959) 5 *McGill LJ* 222 at 241. Floyd's argument that a concept of an administrative agreement could be developed not from private law contract, but from the more general concept of agreement may be read to counter Mewett's concerns. Floyd argues that the concept of agreement is not limited to private law or the specific characteristics of that

in France combines notions of private law contract and administrative law discretion into a single concept.<sup>66</sup> It is especially this latter discretionary dimension of *contrats administratifs* that would be extremely difficult to establish in any development emerging from within ordinary contract law doctrine.

On the other hand, a development from within administrative law would probably only result in what Anne Davies has called a “public law of contract” rather than the desired “law of public contract”. It would amount to little more than the comprehensive public law approach discussed in chapter five where ordinary contract law rules are overlaid with public law rules. Such an approach would also not achieve any real fusion of private and public law rules towards the creation of a distinct legal mechanism to legally conceptualise or construct state commercial activity.

The main disadvantage of a distinct branch of public contract law approach in the current context is therefore its limited ability to achieve a meaningful combination of private and public law rules. It does not take us any further in the search for an effective approach to the judicial regulation of state commercial activity than any of the options discussed in the previous three chapters.

### **3 Regulation on a continuum between private and public law**

In chapter three I argued that the current classification approach of South African courts to the regulation of state commercial activity is deficient *inter alia* because of its failure to account for the complex nature of such activity.<sup>67</sup> The excessive conceptualism of that approach results in a bipolar judicial view

---

legal concept as used in private law, eg in contract. Agreement is in his view a much broader concept that allows for its constructive application in public law such as in the form of administrative agreements: Floyd *Die Owerheidsooreenkoms – ‘n Administratiefregtelike Ondersoek* 5, 60.

<sup>66</sup> Mewett (1959) 5 *McGill LJ* 222 at 241. See also Jarass (1981) 34 *DÖV* 813 at 820 who highlights the unilateral discretionary dimension of French *contrats administratifs* in contrast to the *öffentlich-rechtlicher Vertrag* in Germany.

<sup>67</sup> See chapter three at par 4.1 above.

of the relevant issues under scrutiny in a given instance. This distorts the multifaceted nature of state commercial activity and results in judicial regulation that ignores or denies many dimensions of that activity.<sup>68</sup>

Regarding methodology, the excessive conceptualism and resultant formalism of the classification approach flow from its threshold reliance on the concepts of administrative action and contract. By juxtaposing these two concepts as alternative categories into which state commercial activity must be classified, courts replicate the simplistic bipolar view in their methodology. This problem is closely linked to the familiar difficulties surrounding the distinction between public and private law.

One way of overcoming the limitations of the current approach is thus to investigate alternative views of the public/private divide. In contrast to the approaches discussed in chapters four and five as well as in par 2 above, which all attempt to avoid the public/private divide in the regulatory approach, the alternative investigated here accepts the divide, but attempts to reduce the excessive conceptualism traditionally associated with an approach premised on that divide.

---

<sup>68</sup> Baxter *Administrative Law* 58 – 59 specifically notes the “third dimension” of public tender disputes that are often ignored by courts. This “third dimension” flows from the divergence of public interest from the interest of the relevant organ of state. He accordingly argues for a regulatory view that acknowledges the “trilateral” as opposed to a “bilateral” view of state contracting. Although Baxter’s insight is significant to the extent that it recognises an added dimension to state commercial activity beyond the traditional bipolar or bilateral perspective, his argument is still too narrow. The complex nature of state commercial activity calls for a regulatory view that takes account of the multiple dimensions at issue, which extend beyond the “third dimension” recognised by Baxter. The public interest, constituting Baxter’s “third dimension”, is not a single-faceted concept, but itself a complex one with multiple dimensions. Furthermore, there are often interests involved that do not form part of the public interest *stricto sensu*. Eg the interests of unsuccessful bidders in a public tender process may differ significantly from that of the public and should consequently be specifically accommodated in any regulatory approach.

### 3.1 A complex view of the public/private divide

Benn & Gaus suggest a view of the public/private divide that is much more sophisticated than the traditional approach.<sup>69</sup> They argue that the concepts of “public” and “private” are “thick” ones that signify a large number of varying senses in which social life can be ordered and the content of which is “embedded in a culture and its language.”<sup>70</sup> Accordingly, they suggest that “the many senses of ‘public’ – or the many kinds of publicness – are systematically related to form a *complex-structured concept*.”<sup>71</sup> Of particular interest is their suggestion that there exists a continuity between these two concepts, rather than a stark dichotomy. This continuity can be seen on various levels. Firstly, based on their complex notion of “public” and “private”, Benn & Gaus suggest that there is a “continuity of the various senses of ‘public’ [and private].”<sup>72</sup> As a result the public/private distinction could be viewed in much more fluid terms than in the traditional liberal view.<sup>73</sup> They argue that

[s]ometimes it seems perfectly adequate to assume that publicness and privateness constitute a continuum, along which particular instances can be ordered, ranging from the more public to the more private ... It would seem, then, that privacy can certainly be regarded as a matter of degree. And that may account for some of the uncertainty we sometimes have in deciding whether something is really public or really private.<sup>74</sup>

---

<sup>69</sup> Benn & Gaus in Benn & Gaus (eds) *Public and Private in Social Life* chapter 1.

<sup>70</sup> Benn & Gaus in Benn & Gaus (eds) *Public and Private in Social Life* 5.

<sup>71</sup> Benn & Gaus in Benn & Gaus (eds) *Public and Private in Social Life* 5.

<sup>72</sup> Benn & Gaus in Benn & Gaus (eds) *Public and Private in Social Life* 5, 14: “[P]ublicness – like privateness – is itself a multi-dimensional concept.”

<sup>73</sup> Benn & Gaus in Benn & Gaus (eds) *Public and Private in Social Life* 17 note that “[l]iberalism exhibits strong theoretical pressures towards a bi-polar view of social life...” See also the same authors’ analysis of public and private in liberal theory in Benn & Gaus (eds) *Public and Private in Social Life* chapter 2 and Carole Pateman’s feminist critique of public and private in liberal theory in Benn & Gaus (eds) *Public and Private in Social Life* chapter 12.

<sup>74</sup> Benn & Gaus in Benn & Gaus (eds) *Public and Private in Social Life* 13.

Secondly, even where the concepts of public and private can be clearly circumscribed, the classification in terms of that dichotomy remains fluid because of the “multi-dimensionality” of the criteria used to effect the classification.<sup>75</sup> Most, if not all, of such criteria will produce an answer to the classification exercise that something is more public than private or *vice versa* rather than something *is* public or *is* private.<sup>76</sup>

The notion of a continuum upon which particular actions can be plotted between the extreme poles of public and private is itself, however, a limited view. As Benn & Gaus note, this is because the inherent “bi-polarity” of that view of the continuum “often breaks down” in the face of the “multi-polarity” of the public/private divide.<sup>77</sup> One aspect of this “multi-polarity” can be aligned to Baxter’s criticism of the current South African approach to the judicial regulation of state commercial activity when he notes that public tender disputes are “trilateral” rather than “bilateral”.<sup>78</sup> When a particular action is classified in terms of the public/private divide, using interest as criterion, the

---

<sup>75</sup> Benn & Gaus in Benn & Gaus (eds) *Public and Private in Social Life* 14. To illustrate this point, the authors use the example of classifying economic institutions as either public or private, which is highly relevant in the context of this study. They argue: “We might divide economic institutions into state agencies, which are public, and the rest, which are private. Among the class of public institutions would fall, unambiguously, Telecom Australia, most central banks, and British Rail. But what should we say of a corporation in which a government holds 51 percent (or 49 percent) of the shares? ... The concept of a state agency, while sharp enough to pick out a number of paradigm instances, is not sharp enough to determine every case ... This kind of indeterminacy arises from the multi-dimensionality of the criteria themselves. One of the reasons that ‘state agency’ does not yield an unambiguous determination is that there are multiple criteria for deciding that something is a state agency.” See also Gray & Gray in McLean (ed) *Property and the Constitution* 36.

<sup>76</sup> Gray & Gray in McLean (ed) *Property and the Constitution* 18 describe these insights as “a recognition that the public/private distinction is marked, not by any clean break, but rather by a multitude of finely intercalated distinctions or gradations.”

<sup>77</sup> Benn & Gaus in Benn & Gaus (eds) *Public and Private in Social Life* 14 – 16.

<sup>78</sup> Baxter *Administrative Law* 58 – 59. See note 68 above for a discussion of this criticism and in particular the extension of this argument to recognise not merely the “trilateral” nature of public tender disputes, but the multilateral nature thereof.



opposite of a particular private interest, say the interest of the unsuccessful bidder, is not necessarily the public interest. It may be the interest of the organ of state, which is not necessarily equal to the public interest, or it may be another private interest, such as the interest of the successful bidder. In this scenario it is inadequate to postulate a bipolar continuum upon which the relevant action should be plotted on the basis of interest. Another aspect of the multi-polarity or complexity of the continuum notion is the conflicting outcomes of a particular classification exercise depending on the standpoint from which the classification is done. Benn & Gaus illustrate this aspect with reference to the classification of rooms in a family home.<sup>79</sup> If the rooms in a home are classified on a continuum from the perspective of an outsider (ie a non-family member) then the front porch will be public and the front hall private. However, if the rooms are classified from the perspective of a family member, the front hall will be public and a bedroom private. This simple illustration shows that the poles of the continuum shift according to the criteria that are applied to effect a particular classification. It further implies that the criteria themselves are to be understood on a continuum. A particular action's placement on a continuum between private and public thus entails the intersection of various continuums. The "publicness" or " privateness" of a particular action is thus not simply a function of a linear movement between two opposing poles, but rather of the non-linear intersection of various continuums linking multiple poles.

### **3.2 Regulating state commercial activity on a continuum**

The notion of a continuum can be usefully employed in developing a judicial approach to the regulation of state commercial activity. At the most basic level one can think of administrative action and contract as the two poles of the continuum with any given instance of state commercial conduct falling somewhere between the two extremes. In working out this approach the

---

<sup>79</sup> Benn & Gaus in Benn & Gaus (eds) *Public and Private in Social Life* 15 – 16. Their illustration differs slightly from the one put forward here.

challenge is to identify the factors or regulatory concerns that push regulation to one end or the other of the continuum.<sup>80</sup>

It is important to keep the complex nature of the continuum notion in mind here. It is not simply a matter of positing a continuum between the public law concept of administrative action and the private law concept of contract and plotting any given state commercial conduct on that continuum. A continuum approach should not advance in a bipolar manner, but rather in a multi-polar manner along the lines discussed in par 3.1 above. All the regulatory concerns identifiable in the context of state commercial activity must also be mapped on continuums between private and public in a given instance. For example, public power can be plotted according to both the “publicness” of the power<sup>81</sup> and the sheer extent thereof. Even factors that may seem at first blush to render strict dichotomous answers, such as the source of the power exercised, can upon closer analysis be graded in this manner. In chapter three I argued that the source of the power as a determining factor depends on generality.<sup>82</sup> Source, as a factor, can hence be graded on a continuum ranging from the clearly public (legislation) to the

---

<sup>80</sup> Freedland in Craig & Rawlings (eds) *Law and Administration in Europe* 127 – 128 suggests a similar approach to the legal regulation of what has become known as “government by contract” in England. He argues that it may be helpful to think of this approach of government in the provision of services to the public by means of contracts with private enterprises “as being of various types which fall at different points along a particular kind of spectrum. At one extreme of that spectrum are situations where arrangements can be made which correspond fully to the market contract stereotype, in the sense that independent commercial contractors exist and can provide the services in question by means of market contracts on a continuing basis. At the other extreme are situations where such arrangements are regarded as completely unattainable or completely inappropriate, and where the attempt to replicate them in the form of market analogues produce results which are artificial, in the sense that they are really no more than administrative or governmental arrangements presented in contractual form” (footnotes omitted).

<sup>81</sup> See eg the remarks of Murphy J in *Gerhardy v Brown* (1985) 159 CLR 70 at 107: “The distinction between public power and private power is not clear-cut and one may shade into the other.”

<sup>82</sup> See chapter three at par 3.2.5 above.

clearly private (contract). In this exercise the results of the current classification approach can be quite useful in the way that it has already identified many of the regulatory concerns we have in the context of state commercial activity and that should accordingly be plotted on a continuum in any given case.

The continuum approach is furthermore a highly contextual one. The standpoint from which the regulation of state commercial activity is considered is of paramount importance. Benn & Gaus' example of the family home again provides an effective illustration. Approaching the regulation from the perspective of "outsiders" may differ significantly from an "insider" perspective. The very same state commercial action may thus fall on different points on the continuum between contract and administrative action depending on which perspective serves as the point of departure. For example, it may be adequate to regulate the particular state activity as one of private contract from an "insider's" perspective (eg the parties to the public contract), while for "outsiders" (eg all the tenderers) it may be necessary to regulate the activity as one of administrative action. These perspectives themselves are furthermore contextually contingent. The parties to the contract only became "insiders" once the contract was concluded. Prior to that they were "outsiders" and had a different regulatory perspective.

However, the use of a continuum notion as discussed thus far does not take us much further in reducing the excessive conceptualism and resultant formalism of the classification approach. It simply replicates that conceptualism by coming up with a (conceptual) position where the action under scrutiny should be regulated. It is of little help to simply apply the idea of a continuum conceptually, that is on the conceptual leg of the analysis, to decide how private or how public the relevant action is. The continuum approach I suggest is not a matter of mere classification in a fluid or continuous manner. The conceptual continuum between contract and administrative action must be matched by a continuum of legal rules applying in a fluid manner from one end to the other. The regulation applied in a given

instance of state commercial activity should accordingly be a function of the intersection of the various continuums, both formal and substantive. In other words, both the factors that tell us how to regulate and the rules that apply should be viewed as gradeable. It is on the development of that grading or continuums that we should focus our attention.

### **3.3 A continuum approach in South African law**

In South African law there are starting-points for the development of a continuum approach. In private law Tjakie Naudé's suggestion regarding the use of a typological approach to construct specific types of contract may serve as one useful basis for such development.<sup>83</sup> The notion of types of contract existing alongside (or perhaps between) strict concepts of specific contracts, with all the consequences that such a notion implies, aligns well with the continuum approach suggested above. Naudé's conclusion seems just as apposite here:

In a sense the essential point of the *Typenlehre* is not so much to plead for the use of types rather than concepts, but to plead for typological thinking, which amounts to teleological or purposive thinking, as opposed to purely conceptual, formalistic thinking ... and to emphasise the need for the use of open concepts which require value judgments in addition to sharp, closed concepts in order to correctly reflect, explain and order the complexity of legal reality.<sup>84</sup>

Of particular interest is Naudé's use of the verb "construct" to denote the development of (new) contract types.<sup>85</sup> Included in her idea of "construction" is

---

<sup>83</sup> Naudé 2003 *TSAR* 411. See par 2.1.3 above for a discussion of her arguments.

<sup>84</sup> Naudé 2003 *TSAR* 411 at 430.

<sup>85</sup> Naudé 2003 *TSAR* 411 at 413: "I use the verb 'construct' to refer to the formulation of rules in respect of a specific contract type. It encompasses the abstract process of incorporating a specific contract type, identified in practice, into the legal system, which enables comparisons with other provisions. A category of contracts is therefore described and coherent rules developed for it, and this category is then added to the pantheon of separately regulated

the development of both the factors classifying a particular contract as belonging to a certain type and the rules pertaining to such contract type. She accordingly applies the typological methodology to both these aspects of the analysis. Again this seems to correspond well with the two dimensions of the continuum approach outlined above.

In public law recent developments regarding reasonableness as a component of administrative justice reveal similar continuum notions. In their minority judgment in *Bel Porto School Governing Body v Premier, Western Cape, and Another*,<sup>86</sup> Mokgoro & Sachs JJ argued that the requirement of justifiability<sup>87</sup> entails a flexible “test in each case for appropriately locating the action between” action rationally connected to the reasons thereof and “what the Court itself might have considered the best possible outcome if it had had to make the decision” as the two extreme poles of a spectrum of justifiable administrative action. The judges continued to list a number of relevant factors that might guide a court in assessing the action under scrutiny against such a continuum of justifiable decisions.<sup>88</sup> In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*<sup>89</sup> O'Regan J, for the court, adopted similar reasoning under the Constitution's section 33(1) requirement of reasonableness. She held that reasonableness is a contextual test and listed factors that will assist the court in determining what reasonableness in a given instance requires. O'Regan J's description and application of this

---

specific contract types. The 'construction' of a specific contract type refers not only to residual rules or legal incidents regulating the consequences of the contract, but also to the criteria for classifying a transaction as belonging to the contract type in question. It therefore also encompasses rules on the main rights and duties of the parties which may be classed together with the consequences of the contract, but which may also constitute the criteria for application of the other reserve rules.”

<sup>86</sup> 2002 3 SA 265 (CC) at par 164.

<sup>87</sup> As the predecessor to the current requirement of reasonableness, found in s 24(d) of the 1993 Constitution.

<sup>88</sup> *Bel Porto School Governing Body v Premier, Western Cape, and Another* 2002 3 SA 265 (CC) at par 165 – 166.

<sup>89</sup> 2004 4 SA 490 (CC) at par 45.

contextual test strongly suggest a spectrum with variable levels of reasonableness scrutiny depending on the factors listed.<sup>90</sup> The judge expressly linked this variability of the reasonableness test to the well-established contextual flexibility of the rules of procedural fairness in administrative law.<sup>91</sup> This approach to the components of administrative justice corresponds with a continuum notion, especially on the substantive dimension, where the rules are applied in a gradeable manner. However, O'Regan J's approach in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*<sup>92</sup> also shows signs of a continuum on the more formal, conceptual level, where she argued that the action under scrutiny itself may dictate the degree of deference due to the executive in the given instance.

### **3.4 Advantages of a continuum approach**

#### **3.4.1 Reduced conceptual reasoning**

A continuum approach to the judicial regulation of state commercial activity holds significant advantages over the approaches discussed thus far. It notably reduces the need for stark conceptual reasoning and consequent formalism found in most of the other approaches. This results in a number of further advantages. The reasons for judicial intervention at a particular level are directly and openly engaged rather than in a roundabout or concealed manner as is the case with any highly conceptual approach. Its flexibility allows for regulatory responses that can be much closer aligned to the reality of the case at hand. A court accordingly does not have to force the relevant state action into one of a limited number of fixed legal concepts, which often results in unrealistic and unsatisfactory legal treatment of such action. The

---

<sup>90</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 4 SA 490 (CC) at par 45 – 54.

<sup>91</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 4 SA 490 (CC) at par 45. See also chapter five at par 5.1.1 above for a discussion of the flexibility of procedural fairness rules in administrative law.

<sup>92</sup> 2004 4 SA 490 (CC) at par 46 – 54.

approach also allows for variability *within* the two concepts of contract and administrative action. “Contract” and “administrative action” are thus not viewed as monolithic concepts, which represent single paradigm legal relationships. This approach creates the scope to introduce flexibility into the very concepts allowing for differentiated views of contract and administrative action along a spectrum of its usage. In the context of contract law, Hugh Collins notes:

Once private law embarks on this route of differentiation of contexts of contractual arrangements, it introduces much greater normative complexity into its reasoning processes.<sup>93</sup>

The possibility of shifting poles furthermore makes it possible for judicial regulation to keep up with changing ideas of what constitutes the public and what the private, or more appropriately, which activity we want to subject to common or public control and which not. For this approach to function effectively it is not necessary to construct *a priori* and abstract definitions of what the notions “public” or “private” mean.<sup>94</sup>

A continuum approach does not, however, completely abandon conceptual thinking to leave one in a marsh of uncertainty.<sup>95</sup> By positioning established legal concepts, contract and administrative action, at the extreme ends of the spectrum a determined framework is maintained. It is, however, inevitable that a continuum approach will involve some measure of

---

<sup>93</sup> Collins *Regulating Contracts* 50.

<sup>94</sup> Cf Van der Walt (2004) 19 *SAPR/PL* 676 at 697: “[T]he notions of public and of private are just as unstable and contested as the distinction between them.”

<sup>95</sup> Bullinger *Vertrag und Verwaltungsakt* 91 argues that the consistent use of private law contract rather than some public law form of action is of paramount importance in the commercial context where certainty is critical, because of the well developed (and hence clear) nature of private contract law doctrine. See also Davies *Accountability* 205 on the potential adverse effects of uncertainty regarding the applicable law to state commercial dealings and Naudé 2003 *TSAR* 411 at 430 – 431 on the importance of maintaining legal certainty by retaining a role for clear concepts in her suggested typological approach to the classification of contracts.

uncertainty. However, such uncertainty is sufficiently offset by the advantages of a continuum approach. As Braithwaite & Parker note in a related context:

[W]hy should [we] be worried about whether we can find coherence in this complexity[?] 'We do not regard a complex biodiverse ecosystem in dynamic flux as problematic. Quite the contrary!' As we have seen, there is much to celebrate in constantly moving, plural sources of influence. Indeed it may provide greater scope for dynamism and innovation in proceeding towards normative goals than the alternative.<sup>96</sup>

### 3.4.2 Advancing transformative constitutionalism

The continuum approach accords well with the project of transformative constitutionalism in South Africa.<sup>97</sup> It allows courts to openly and directly assess the state's adherence to the core values of transparency, accountability and participation in the form of directly relevant indicators. At the same time, however, courts can balance the realisation of those values

---

<sup>96</sup> Braithwaite & Parker in Parker *et al* (eds) *Regulating Law* 282. With this remark the authors specifically refer to the contributions of Jane Stapleton ("Regulating Torts") and Peter Cane ("Administrative Law as Regulation") in Parker *et al* (eds) *Regulating Law* chapters 6 and 10 respectively. Cane in Parker *et al* (eds) *Regulating Law* 216 argues along similar lines "that administrative law has various 'local' and specific goals that interact in complex ways, and that they compete and conflict with one another. We should be wary of jumping from the proposition that administrative law is goal-oriented to the conclusion that it has one overarching goal as opposed to a multiplicity of goals." The continuum approach is indeed sensitive to this "multiplicity of goals" in the way that it fosters a complex view of the regulation process. By not committing to a particular set of regulatory tools *a priori*, the continuum approach allows scope for differentiated goals to be pursued in different contexts (or even instances) of state commercial activity. It therefore does not require an abstract commitment to a particular set of regulatory goals. Under the continuum approach courts can directly assess the particular regulatory goals pursued in the given instance when considering the desirability of applying a particular regulatory tool. This advantage far outweighs any disadvantage in increased uncertainty.

<sup>97</sup> See chapter five at par 4 above for a discussion of this project.



against efficiency and effectiveness concerns in state administration. One can thus construct multiple continuums with each of the core values at one end and efficiency and effectiveness at the other end respectively. But the core values may also be placed at opposing ends of multiple continuums since it is not inevitable that these values will pull regulation in the same direction in all instances. This will allow us to openly consider the recurrent trade-off between these various dimensions of constitutional transformation. In this manner adjudication practices are also brought in line with the Constitution's vision of a transformed legal culture by promoting the "honesty and cogency of the reasons"<sup>98</sup> for a particular (form of) judicial intervention in state commercial activity. The continuum approach manages to infuse the Constitution's normative framework into existing private law doctrine by both maintaining and blurring the distinction between public and private law.<sup>99</sup> By opening doctrine up to greater variability and differentiation in relation to its basic concepts, such as contract or administrative action, "much greater normative complexity [is introduced] into its reasoning processes."<sup>100</sup> In the South African context that normative complexity necessarily has the Constitution at its base.

### **3.4.3 Continuity as central characteristic**

To speak of a continuum is perhaps not the most accurate imagery to label the approach put forward in this section. The image of a continuum not only suggests a bipolar approach, but also linear movement between such poles. However, the approach discussed here is a more complex one. Firstly, in the

---

<sup>98</sup> Langa (2006) 17 *Stell LR* 351 at 353. See also chapter five at par 4.1 above.

<sup>99</sup> In their application of Benn & Gaus' complex view of the public/private divide to property law, Gray & Gray in McLean (ed) *Property and the Constitution* 29 state: "Slowly but surely private property is being required to reach some accommodation with a public morality which gives effect to minimum standards of democratic community." Similar reasoning can be adopted here in relation to the effect of the continuum approach on other private law fields, such as contract.

<sup>100</sup> Collins *Regulating Contracts* 50.

context of state commercial activity there are often not merely two opposing poles, but mostly multiple “opposites” between which the regulation must navigate. For example, regarding the interests involved Baxter’s basic argument that state tender disputes are “trilateral” rather than “bilateral” can be extended to reveal a complex network of interests behind state commercial activity.<sup>101</sup> The proposed approach takes account of that reality by positing multiple poles to the spectrum against which the regulation is to be mapped out. Secondly, movement between these poles is not necessarily linear, particularly because the factors influencing the movement between the basic poles of contract and administrative action are themselves gradeable. The approach suggested here understands the judicial regulation of state commercial activity as a complex system.<sup>102</sup> It is perhaps more accurately

---

<sup>101</sup> See notes 68 and 78 and accompanying text above.

<sup>102</sup> Paul Cilliers identifies the characteristics of a complex system as follows:

- “1. Complex systems are open systems.
2. They operate under conditions not at equilibrium.
3. Complex systems consist of many components. The components themselves are often simple (or can be treated as such).
4. The output of components is a function of their inputs. At least some of these functions must be non-linear.
5. The state of the system is determined by the values of the inputs and outputs.
6. Interactions are defined by actual input—output relations and they are dynamic (the strength of the interactions change over time).
7. Components on average interact with many others. There are often multiple routes possible between components, mediated in different ways.
8. Some sequences of interaction will provide feedback routes, whether long or short.
9. Complex systems display behaviour that results from the *interaction* between components and not from characteristics inherent to the components themselves. This is sometimes called emergence.
10. Asymmetrical structure (temporal, spatial and functional organization) is developed, maintained and adapted in complex systems through internal dynamic processes. Structure is maintained even though the components themselves are exchanged or renewed.
11. Complex systems display behaviour over a divergent range of timescales. This is necessary in order for the system to cope with its environment. It must adapt to changes in the environment quickly, but it can only sustain itself if at least part of the system changes at a

described not in spatial terms but as relationship and dialogue.<sup>103</sup> This

---

slower rate than changes in the environment. This part can be seen as the 'memory' of the system.

12. More than one description of a complex system is possible. Different descriptions will decompose the system in different ways. Different descriptions may also have different degrees of complexity": Cilliers (2005) 22 *Theory, Culture & Society* 255 at 257, see also Cilliers *Complexity and Postmodernism* 3 – 5 and 119 – 123 for an informative application of the characteristics of complex systems to postmodern society. Even a relatively thin analysis in terms of these characteristics of the approach to the judicial regulation of state commercial activity suggested here seems to indicate that such regulatory approach can be viewed as a complex system. The regulation under this approach is open and dependent on context. It is also clear that judicial regulation of state commercial activity influences and is influenced by other forms of legal control, ie other systems. The various factors informing the regulation can be seen as its components and it is the rich interaction between these factors that determines the behaviour of the system, ie the regulation applied by a judge. The highly contingent nature of the factors allows the system to adapt to changes in the environment, eg changing societal views of what constitutes the public sphere, but while the weight attached to specific factors may decrease, those factors do not disappear. They remain as the "memory" of the system, eg the reduced significance of the identity of the actor in the current approach to the judicial regulation of state commercial activity, see chapter three at par 3.1 above. The system operates under "conditions far from equilibrium": Cilliers *Complexity and Postmodernism* 4. If the various factors informing judicial regulation of state commercial activity were in equilibrium such regulation would pose no difficulty. We would be able to devise a relatively simple and stable matrix to calculate the particular legal rule to be applied in a particular instance and along that route be able to clearly determine how the state and its counter-party should act. There would accordingly be no need for the intervention of legal specialists, such as judges. Experience tells us differently. Identifying the judicial regulation of state commercial activity as a complex system allows one to draw on the insights developed by theorists working in complexity theory in fashioning an appropriate approach to such regulation. One important such insight is that "complexity theory does not provide us with exact tools to solve our complex problems, but shows us (in a rigorous way) exactly why these problems are so difficult": Cilliers (2005) 22 *Theory, Culture & Society* 255 at 257.

<sup>103</sup> For an analysis of rights as relationships and dialogue in contrast to spatial metaphors such as rights as boundaries or containers, see Nedelsky (1993) 1 *Review of Constitutional Studies* 1; Singer *Entitlement* chapter 3; Minow *Making All the Difference*; Schlag in Sarat & Kearns (eds) *Legal Rights* 261 *et seq.* And for a more general discussion of the use and relevance of these metaphors in transformative constitutionalism in South Africa, see Botha 2002 *TSAR* 612, 2003 *TSAR* 20. In his analysis Botha argues: "It would appear, then, that the conception of rights as relationship and dialogue is better suited to the democratic-

approach focuses on the relationship between the basic concepts of contract and administrative action as well as the relationships between the various factors informing that primary relationship. These relations are multiple, which in Pierre Schlag's words "include not only opposition, but combination, appropriation, subordination, nesting, and mutual dependence."<sup>104</sup> The approach is "dialogic to the extent that it institutes a debate about the cogency of the justifications offered" for judicial regulation "and requires judges to articulate the substantive reasons for their decisions, rather than simply declare the case to fall within a particular category."<sup>105</sup> Furthermore, in terms of this approach, state commercial activity is conceived as "a radial category

---

transformative aspirations of the South African constitution than the idea of rights as boundaries." He notes that advocates of the relationship/dialogue metaphors argue that courts should adopt "a justificatory or limitation-based approach" to constitutional adjudication and that such an "approach is said to be relational to the extent that it focuses on the relationship between a fundamental-rights limitation and its purpose and/or the comparative weight of competing rights and interests": Botha 2003 *TSAR* 20 at 26. I use the metaphor of relationship in a similar sense here.

<sup>104</sup> Schlag in Sarat & Kearns (eds) *Legal Rights* 268.

<sup>105</sup> Botha 2003 *TSAR* 20 at 26, with reference to a limitation-based approach to constitutional adjudication in South Africa. This dialogic nature of the approach suggested here also aligns with the recognition that judicial regulation of state commercial activity is a complex system. In complexity theory a similar need for justification is recognised generally as a result of the proposition that "knowledge is provisional". Cilliers states: "We cannot make purely objective and final claims about our complex world. We have to make choices and thus we cannot escape the normative or ethical domain" and "[t]he view from complexity entails that we cannot have perfect knowledge of complex systems. We cannot 'calculate' the performance of, for example, complex social systems in their complexity; we have to reduce that complexity; we have to make *choices*. Normative issues are, therefore, intertwined with our very understanding of complexity. Ethical considerations are not to be entertained as something supplementing our dealings with social systems. They are always already part of what we do. One could attempt to deny that and operate as if one can deal with complexity in an objective way — as if we can calculate everything — and thereby avoid the normative dimension. But this denial of the ethical becomes an avoidance of responsibility and is, of course, ethical in itself, albeit a negative (and much too prevalent) ethics": Cilliers (2005) 22 *Theory, Culture & Society* 255 at 259, 264.

consisting of both core and peripheral areas.”<sup>106</sup> These areas are not determined in a mechanical or formalistic manner eg by asking whether the relevant actor is subject to government control,<sup>107</sup> but with reference to the values that the regulation seeks to protect.<sup>108</sup>

Whatever the imagery,<sup>109</sup> the approach discussed here is useful in the way that it opens up the possibility of greater fluidity in the judicial regulation of state commercial activity. It is therefore the continuity between private and public that stands at the centre of this approach. This approach fosters a much greater judicial sensitivity to the specific concerns involved: the specifics of a particular case, a particular point of view, a particular impact etc. It also brings home an important legal insight, namely that there is no compelling need to treat familiar legal concepts, such as contract and administrative action, as monolithic one-dimensional constructs. We can view them in a differentiated way that allows for much more flexibility in doctrine and resultant legal rules across a broad spectrum of their usage. Paul Cilliers captures this insight when he states as a general claim of complexity theory:

[T]he fact that the concept has to be communicated clearly, not by approximation, does *not* imply that the concept now has an indisputable identity. In a different context a different set of differentiations may come into play which would give the (still clearly recognizable) concepts different meanings. For the

---

<sup>106</sup> Botha 2003 *TSAR* 20 at 32, with reference to the Constitutional Court’s conceptualisation of the right to privacy.

<sup>107</sup> See chapter three at par 3.1.2 above for a discussion of the discredited control test to establish whether a particular actor is an organ of state.

<sup>108</sup> See Botha 2003 *TSAR* 20 at 33, where he argues that viewing the right to privacy as a radial category rather than in terms of a spatial metaphor allows for a rejection of an approach where “challenges under the right to privacy turn on the place where an alleged violation occurred, rather than the values it seeks to protect.”

<sup>109</sup> On the importance of the use of metaphors in legal thought, especially with regard to transformative constitutionalism in South Africa, see Botha 2002 *TSAR* 612 (at 616: “Metaphors are not mere rhetorical devices, but give structure and coherence to our conceptual system”), 2003 *TSAR* 20.

concept to have meaning at all, it has to be limited, but these limits are not a priori or external to the situation. They are contingent and historical.<sup>110</sup>

#### 4 Conclusion

There have already been some suggestions in South African jurisprudence of an approach to the regulation of state commercial activity that combines public and private law rules. Most notably in *Logbro Properties CC v Bedderson NO*<sup>111</sup> Cameron JA declared in relation to the public tender process before the court:

Principles of administrative justice continued to govern that relationship, and the province in exercising its contractual rights in the tender process was obliged to act lawfully, procedurally and fairly. In consequence, some of its contractual rights - such as the entitlement to give no reasons - would necessarily yield before its public duties under the Constitution and any applicable legislation. This is not to say that the conditions for which the province stipulated in putting out the tender were irrelevant to its subsequent powers ... such stipulations might bear on the exact ambit of the ever-flexible duty to act fairly that rested on the province. The principles of administrative justice nevertheless framed the parties' contractual relationship, and continued in particular to govern the province's exercise of the rights it derived from the contract.

In chapter five I identified this “framing approach” as a comprehensive public law one, where public law rules are simply superimposed on contract law rules governing the commercial activity. Although this approach combines public and private law rules I argued in chapter five that such rudimentary combination is inadequate, primarily because it fails to produce an integrated

---

<sup>110</sup> Cilliers (2005) 22 *Theory, Culture & Society* 255 at 263.

<sup>111</sup> 2003 2 SA 460 (SCA) at par 7 – 8 (footnotes omitted).

approach. What is needed is an approach that combines private and public law rules in an integrated fashion to produce a synergy between the various strengths of existing rules. Such a synergy cannot be achieved by simply stockpiling all those rules to create a mammoth and overbearing regulatory regime. In this chapter I accordingly investigated two ways in which the desired combination of public and private law rules can be achieved.

The first option is the development of a distinct branch of government contract law. Continental European systems, like those of Germany and France, are good examples of such an approach. In essence, under such an approach, courts will develop separate and specific rules governing a distinct legal concept of government or public contract. Apart from doubt whether the necessary incentives exist in South African law for such development, there are a number of disadvantages to such an approach that strongly militate against it. In the final analysis such an approach does not resolve all of the objections raised against the existing approaches. The approach remains overly reliant on conceptual reasoning, which is a fundamental stumbling block in most (if not all) of the existing approaches.

The second option is based on a complex view of the public/private divide. It views the divide as continuous rather than dichotomous as is traditionally done. While public and private remain at either end of the spectrum there is no clear or strict distinction between the poles. A fluid continuum can accordingly be constructed between the poles upon which state commercial activity can be plotted to determine the degree of its “publicness” and “ privateness”. This view is quite helpful in developing a regulatory approach that engages directly and openly with the various regulatory concerns one can identify in state commercial activity. Not only can a continuum be constructed with the basic legal concepts of contract and administrative action at either end with state commercial activity always falling somewhere in between, but the criteria that dictate the particular action’s position on that continuum can themselves be viewed in a fluid manner

between the extremes of private and public. Regulation in a particular case is consequently determined by the intersection of various continuums.

This continuum approach holds the biggest promise towards the development of a sophisticated approach to the judicial regulation of state commercial activity. One of the biggest challenges in this endeavour will be to develop a continuum of legal rules matching the largely conceptual continuum outlined above. In this development the existing rules of private (contract) and public (administrative) law could be (re)moulded to achieve regulation that responds in its substantive outcomes to the “publicness” and “ privateness” of a particular state commercial action and does so in a continuous manner across the range of state commercial activity. The continuum approach is in many ways a developed form of the current classification approach. By stressing the continuity between the various existing sets of regulatory tools available and the criteria used to decide between them the continuum approach aims to develop the classification approach to a more complex one both in relation to the rules eventually applied and the goals pursued. It thus seems to view the judicial regulation of state commercial activity in terms of a model of a complex system and allows one to draw upon the insights developed in complexity theory in approaching this particular instance of legal control.

The continuum approach suggested here translates André van der Walt’s nuanced view of the bridge metaphor<sup>112</sup> in the 1993 Constitution<sup>113</sup> into a feasible judicial approach to state commercial activity. Van der Walt argues that the bridge metaphor allows for an interpretation

---

<sup>112</sup> Van der Walt (2001) 118 *SALJ* 258. See also Van der Walt (2001) 16 *SAPR/PL* 1 and cf Botha 2002 *TSAR* 612, 2003 *TSAR* 20; Le Roux (2004) 19 *SAPR/PL* 629.

<sup>113</sup> The postamble to the 1993 Constitution stated: “This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.”



where the bridge is not simply an instrument for getting out of one place and into another, but an edifice that is inherently related to the abyss which it spans. Here, the focus is not on the two spaces on either side of the abyss, but on the abyss itself – the bridge is functionally and essentially linked to and obtains its significance from the abyss beneath it, so that the bridge is not a temporary instrument for a single crossing, one way, but allows and invites multiple crossings, in both directions, since there is no inherent value attached to being on one side of the bridge rather than the other.<sup>114</sup>

The continuum approach can be viewed in similar fashion as a bridge between the basic regulatory avenues as a permanent judicial path. Its focus is not on being at either side, that is pure contract law or administrative law, but rather on the space between them and the abyss it spans. The purpose of the bridge is to span the abyss. The bridge is thus a response to what lies beneath and is designed with an eye on the abyss rather than the two end-points.<sup>115</sup> When a court is considering the specific rules to apply in regulation of state commercial activity, it should do so in a manner that addresses the regulatory concerns, the substantive issues, that call for the bridge (ie the abyss). By being permanently present the bridge allows courts to move between the two end-points and to ensure that the pillars supporting the bridge are designed to counter the crevices of the abyss, that the specific point where we find ourselves on the bridge is the optimal point to counter the

---

<sup>114</sup> Van der Walt (2001) 118 *SALJ* 258 at 295 – 296 (footnotes omitted).

<sup>115</sup> Van der Walt (2001) 118 *SALJ* 258 at 296 note 183 quotes Jacques Derrida who effectively captured this quality of the bridge metaphor when he said: “A bridge spans a divide, a chasm, and without the chasm, it is no bridge at all.”

specifics of the abyss at that point and hence that the regulation applied is an optimal response to the substantive regulatory concerns of the specific instance.

## CHAPTER SEVEN

# MODELLING A JUDICIAL APPROACH TO THE REGULATION OF STATE COMMERCIAL ACTIVITY

### 1 Introduction

The law governing state contracting in South Africa is a particularly neglected area of research. It is barely recognised, let alone studied, as a distinct legal field.<sup>1</sup> This is surprising from both a quantitative and qualitative perspective on state commercial activity. The volume and monetary value of such state activity is enormous. In South Africa state commercial activity is a primary vehicle for the realisation of important public policy objectives such as black economic empowerment and social service delivery. However, financial management in the public sector is poor.<sup>2</sup> Successful legal challenges to

---

<sup>1</sup> This is evident from the fact that the first book dealing specifically with this area of law in South Africa was only published in 2007: Bolton *The Law of Government Procurement in South Africa*. Apart from a spate of recent articles by Bolton, now incorporated in her book, local academic publications on state contracting are few and far between, with the notable exceptions being Plasket in Glover (ed) *Essays in Honour of AJ Kerr* 159; Floyd (2006) 21 *SAPR/PL* 161, (2005) 20 *SAPR/PL* 378; Hoexter (2004) 121 *SALJ* 595; Pretorius (2002) 119 *SALJ* 374; Burns (1998) 13 *SAPR/PL* 234; Grogan (1990) 11 *ILJ* 655, (1991) 108 *SALJ* 237, (1991) 108 *SALJ* 599; Harris & Hoexter (1987) 104 *SALJ* 557; Booysen (1984) 9 *SAYIL* 56.

<sup>2</sup> The Auditor-General reported in his *Quarterly Report of the Auditor-General on the Submission of Financial Statements by Municipalities and the Status of Audit Reports as at 31 December 2006 for the Financial Year ended 30 June 2006* that by 31 December 2006, of the municipalities that have control over private companies, 45% failed to submit consolidated financial statements for the financial year ended 30 June 2006 and 58% failed to submit such statements for the financial year ended 30 June 2005; that of those companies themselves, for the 2005-2006 financial year, 17% submitted financial statements late and 32% not at all and for the 2004-2005 financial year, 35% did not submit financial statements at all. In his *General Report of the Auditor-General on Audit Outcomes for the Financial Year 2005-06* the Auditor-General noted at 2: "For the 2005-06 financial year the most noticeable finding has been the increase in qualification issues at both national department and national public entity level." This the report ascribes to:

"Improvements within the audit process;

Inadequate systems, guidance and tools to manage the movement from cash to accrual accounting;

public tender awards are commonplace. One would expect these factors to generate considerable academic interest in the law governing state commercial activity. However, in South Africa it is not clear what the law governing state commercial activity is. There is a large volume of legislative provisions aimed at specific aspects of state commercial activity, especially public procurement,<sup>3</sup> but these statutory mechanisms are fragmented and do not present a coherent view of the legal treatment of state commercial activity in South Africa. In common law there is no specific body of law governing state commercial activity. Any significant attempt to address the deficiency in academic engagement with the legal regulation of state commercial activity in South Africa must therefore start with an analysis of how this form of state conduct is modeled in the legal system.

The legal system is a model of a complex social system. The model cannot represent the social system in its complexity since that would mean that the model is just as complex. In order to make useful claims about the social system it is necessary to choose a framework within which the system is analysed. My analysis is placed within the framework of judicial regulation. This is not simply an arbitrary choice. Given the severely fragmented nature of legislative regulation of state commercial activity, it is not possible to obtain or develop a coherent legal view of such activity in South Africa through an analysis of the relevant statutory provisions.<sup>4</sup> Furthermore, as Karl Klare

---

Lack of capacity building and knowledge transfer instigated by accounting officers; Lack of prioritisation of financial management by accounting officers.” The report continues to note: “Many of the qualification issues raised and matters emphasised in my audit reports involve basic elements of financial management which are simply not being done or have not been implemented. After six full years of implementing the PFMA, this situation reflects poorly on those accounting officers and their ability to control their organisations.”

<sup>3</sup> For a detailed analysis of these statutory provisions, including the myriad of regulations, notices and other instruments made under these provisions, see Bolton *The Law of Government Procurement in South Africa*.

<sup>4</sup> The one exception is perhaps an analysis of the use of state commercial activity as a policy tool and in particular to redress the inequalities caused by apartheid. This dimension of state commercial activity is largely statutorily driven and it may thus be possible to develop a coherent view of this particular aspect (this is not to suggest that the legal regulation of this

notes: "Adjudication uniquely reveals ways in which law-making and, by extension, legal practices generally, are and/or could be a medium for accomplishing justice."<sup>5</sup>

In this chapter I draw upon the analysis in the preceding chapters to make a number of modest claims<sup>6</sup> regarding the development of a model of judicial regulation of state commercial activity. My purpose is to suggest a strategic legal model<sup>7</sup> of state commercial activity in South Africa. It is not an exclusive model, but simply one model amongst potentially many other models. It is a judicial model in the sense that it takes judicial action as the

---

dimension is coherent). See Bolton *The Law of Government Procurement in South Africa* chapter 10 for an analysis of public procurement as a policy tool in South Africa.

<sup>5</sup> Klare (1998) 14 *SAJHR* 146 at 147. See also Black & Muchlinski in Black, Muchlinski & Walker (eds) *Commercial Regulation & Judicial Review* 16, who argue that a concern about judicial review is a concern about the legal system as a whole: "When we complain about judicial review we are often just complaining about law."

<sup>6</sup> I use the term modest here as developed by Paul Cilliers, who describes modest claims as "reflective positions that are careful about the reach of the claims being made and of the constraints that make these claims possible ... [which] are not relativistic and, therefore, weak [but] responsible ... [and which] become an invitation to continue the process of generating understanding": Cilliers (2005) 22 *Theory, Culture & Society* 255 at 256, 262, 260.

<sup>7</sup> Teubner in Teubner (ed) *Dilemmas of Law in the Welfare State* 305 describes strategic models as "highly selective legal constructions of social reality. Their selectivity is defined by the social context and the criteria of selectivity result from the mutual limitation of their empirical, prospective and operative sub-models. Their ultimate test is re-entry into social reality. Their social function is the self-identification of the legal system as a criterion for its own transformation." Strategic legal models are thus complex models, consisting of three sub-models: the empirical, strategic and operative. Teubner defines these sub-models as follows: "The empirical sub-model concerns the social field regulated by law, i.e. empirical theoretical statements about social structures, functions and development tendencies in the regulated areas, and interrelations between legal norms and social structures. The *prospective* sub-model defines the dimension of normative evaluation and strategic goals. It refers to fundamental principles which justify the specific way that legal norms should govern human actions. It has to do with statements about the purposes of law, means-ends-relations, and evaluations of legal and social consequences. The *operative model*, finally is closely oriented to action and shows the strongest degree of manipulation of the original data. It has to do with the internal conceptual and procedural structure of law and the systematization of doctrine."

operative dimension. I start by noting the model that South African courts currently use in regulating state commercial activity. This can be called a classification approach. My critique of that model leads me to assess two alternative models, an exclusively private law model and a comprehensive public law one, which can be said to already exist in South African law. However, I also conclude that these two alternatives are lacking. Consequently, I suggest two possible avenues for developing a new model in South African law. The final part of the chapter highlights a number of considerations that inform this development.

## **2 Existing models**

### **2.1 The current classification approach<sup>8</sup>**

My analysis of the jurisprudence on state commercial activity shows that South African courts follow what can be called a classification approach. In terms of this approach each instance of state commercial activity is classified as either subject to private law regulation or public law regulation. In other words, the action is legally viewed as either administrative action or purely contractual action. The criteria used to do this classification are the following:

- the identity of the actor;
- the source of the power exercised;
- the use of superior and/or state power in concluding the transaction;
- public interest in the particular action;
- the fulfillment of a public function; and
- the impact of the action, particularly on individual legal rights.

These criteria cannot be formulated with any certainty and they do not provide us with consistent guidelines of when particular state action will be legally treated as a matter of administrative law and when it will be treated exclusively as a matter of contract law. While the criteria that have crystallised under the classification approach identify important aspects of state commercial activity that merit increased judicial control, the relationships

---

<sup>8</sup> See chapter three above.

between the criteria and the ensuing substantive regulation and particularly the relationships between these criteria remain nebulous.

Ultimately, this approach is characterised by excessive conceptualism and resultant formalism. The reality that judges choose what regulation to apply to particular instances of state commercial activity is hidden. The application of specific substantive rules is made to seem natural, inevitable and evident. The important point is thus not that judges have a choice of what rules to apply, but that the choice is denied or obscured by the methodology. This closes off any dialogue about that choice.

## **2.2 Removing choice from the model**

If the main problem with the current approach is the treatment of judicial choice in that model, one can search for models that remove individual choice from the approach as viable alternatives. None of these alternative models can take choice completely out of the equation. However, as I noted above in relation to the current classification approach, the problem does not lie in the choice itself, but in the way the choice is made. In searching for alternative models, one should thus focus on the way in which the choice of regulatory means is structured. Two alternative ways of dealing with choice can be identified within existing South African law. Firstly, a model can be constructed where state commercial activity is viewed as falling exclusively within only one of the regulatory categories. The second model is to apply both sets of regulation to all instances. In both models an individual judge is thus given no discretion regarding what regulatory means to apply. That choice is made *a priori*.

### **2.2.1 Single category approach<sup>9</sup>**

The first alternative model originates from cases where the courts treated state commercial activity as nothing more than “normal” commercial action that is accordingly subject to private law regulation only, mostly in the form of contract law rules. It can thus be called an exclusively private law approach.

---

<sup>9</sup> See chapter four above.

The substance of this model is not, however, equivalent to the existing examples of an exclusively private law approach. An analysis of especially contract law illustrates that there are sufficient doctrinal tools available to flesh out an exclusively private law approach so as to meaningfully respond to the particular regulatory issues arising from state commercial activity.

This model is superior to other models in the way that it promotes government efficiency and effectiveness. It is furthermore highly reflexive so that it does not distort the social practice it seeks to regulate by being sensitive to the communication system within which the practice is situated. This is an important characteristic of the exclusively private law approach since it allows the parties to principally structure, maintain and enforce the regulatory environment in which their relationship plays out. Theoretically the model should thus be fairly adaptive to the vast range of greatly discriminate contexts in which state commercial activity takes place. The model accordingly avoids the difficulties regarding choice of regulatory measures by individual judges without being unduly restrictive in the regulation it applies. The success of the model, however, hinges on extensive further development of various private law doctrines. While the Constitution provides strong incentives for such development, analysis of case law suggests that it is unlikely that the full extent of this development will occur in the immediate or near future.

The appeal of an exclusively private law approach is severely undermined by this model's tendency to represent legal relationships in fairly simple bi-polar terms. This tendency fails to give adequate recognition to the rich nature of interconnected networks of relationships framing state action. Barring fundamental development of contract law doctrine to break free from the traditional monolithic view of contract as a legal concept, an exclusively private law approach will remain simplistic and unable to sufficiently internalise the complexity of state commercial activity within the regulatory model.



### **2.2.2 Cumulative approach<sup>10</sup>**

The second alternative model to the present classification approach is one where both public and private law regulation apply to all instances of state commercial activity. The two sets of regulation are simply cumulatively applied with public law as the ranking set of regulation. In this model state commercial action is thus viewed simultaneously as administrative action and contractual in nature. This is the most extensive or comprehensive form of judicial regulation within existing South African law.

By implementing the most comprehensive form of legal control this cumulative approach reduces the possibility of abuses of state power and keeps the state within strict legal limits. In this manner it highlights the fact that the state fundamentally differs from all other market participants and should thus be regulated differently. The multiple components of this model furthermore enable it to integrate much more of the complexity of state commercial activity into the regulatory approach. While contract law regulation focuses the regulatory attention on the relationship between the parties to the transaction, public law regulation ensures that the wider interests, beyond those of the parties to the transaction, are not neglected.

However, the cumulative approach is not ideal either. Although comprehensive regulation under this model should not be equated with burdensome or onerous regulation, especially if the variable content of public law rules is kept in mind, this model does seem to seriously limit the state's ability to harness market forces in the public interest. For a cumulative model not to undermine the very purpose of state commercial activity it is therefore critically important to develop legal mechanisms that can shield particular instances of state commercial activity from unwarranted restrictive forms of regulation. Such forms may include the mere availability of judicial review under specific circumstances, which seems to bring one back to a classification dilemma.

---

<sup>10</sup> See chapter five above.

### **2.2.3 *A priori* choice**

Neither of the two alternative models to the current classification model suggested above seems to adequately resolve the major problems of the current model. Although these two alternatives largely remove the choice of regulatory means from the individual judge (and instance) they shift that choice to a position in the regulatory approach where it may be even more problematic. The choice of regulatory means is relocated to an *a priori* position. This simply reinforces conceptualism and formalism in the judicial approach to the regulation of state commercial activity. However, by uncoupling the choice from individual instances and a specific context, that choice is made to seem even more inevitable and natural than under the current approach. In fact, it is made to look like no choice at all. Consequently, any prospect of responsibility for that choice is eliminated.

The treatment of choice in the three models discussed above is out of step with the project of transformative constitutionalism that Klare identifies as central to our Constitution.<sup>11</sup> These models do not enhance judicial justification for the courts' involvement in state commercial activity. They ultimately fail to facilitate judges' "responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values."<sup>12</sup>

## **3 Developing new models**

The failure of the current model and of the existing alternative models to produce a satisfactory judicial approach to the regulation of state commercial activity suggests that new models must be developed. However, the lessons learned from the analysis of the current and alternative models propose that any successful model must combine public and private law regulation in an integrated approach. The goal of fashioning a new model should be to create a synergy between the control functions of public law rules and the facilitating functions of private law rules.

---

<sup>11</sup> Klare (1998) 14 *SAJHR* 146.

<sup>12</sup> Langa (2006) 17 *Stell LR* 351 at 353.

### **3.1 Combining public and private law regulation**

I analysed two ways in which private and public law regulation can be meaningfully combined to develop an integrated new model.<sup>13</sup> Firstly, a third regulatory category can be created that includes only state commercial activity and within which specific rules can be created tailored to that category. Secondly, the current classification approach can be remodeled with reference to a more complex view of the public/private divide.

#### **3.1.1 A third category**

Continental European legal systems, such as those of Germany and France, provide examples of distinct legal figures that exist between contract and administrative law. The recognition of these distinct figures provides the prospect of developing a separate set of regulation that is tailored to the specific needs of that figure. A separate branch of government contract or government commercial law can accordingly be created along this route. Such a development is, however, not easily achieved. In South African law it may be possible to stimulate such development by recognising state contracts as a separate class of contract.

There are a number of problems with this model. The model does not really escape the difficulties of conceptualism and choice that plague the current and alternative models discussed in par 2.2 above. It is still left to the individual judge to determine whether a particular contract falls within the third category. The French and German models show that this problem replicates the difficulties underlying the classification of state commercial action in the current South African approach. It may even add to these difficulties by adding another category into which the action can be classified. It is furthermore highly doubtful whether the development of a third regulatory category in South African law will produce the kind of integrated approach called for in the judicial regulation of state commercial activity. By again separating, albeit in a different manner, state action from analogous private action the required integration may be impeded.

---

<sup>13</sup> See chapter six above.

### 3.1.2 Complex choice

The most promising option for the development of a new approach is actually a return to the current classification approach. A more sophisticated view of the public/private divide may provide the basis for the refinement of the current classification approach towards a new model that more adequately juggles the various considerations at play in the judicial regulation of state commercial activity.<sup>14</sup> By viewing the divide between the public and the private not in dichotomous terms, but in a more fluid, continuous way new avenues are opened up for the creative development of a regulatory approach that can overcome most of the problems experienced under the other models.

In terms of this model, contract and administrative action are not viewed as sharply distinct monolithic legal concepts, but as multi-dimensional social practices that stand in a complex relationship with each other. The task of the judicial regulator is to decide in every case how public and/or how private the specific instance of state commercial activity is, ie what the relationship between the two notions entails in that instance. This determination is done through direct and open engagement with an open number of contextually contingent considerations that impact on the relationship. Furthermore, these considerations are themselves multi-dimensional and stand in complex relationships with each other. The regulation applied to a particular instance of state commercial activity is eventually a function of this network of relationships.

The challenge in the realisation of this model is to develop an understanding of the network of substantive regulatory rules that matches the relational network in the model of the social practice it is meant to regulate. In this development it may be helpful to loosen the link between the conceptual application dimension and the substantive content of legal rules, ie that a rule is one of administrative law and can accordingly only apply where there is administrative action. This development is certainly a daunting one and an exercise that will inevitably not be easy or fast-paced. However, as courts are

---

<sup>14</sup> See par 3.2 below for a discussion of some of these considerations.

faced with similar fact-patterns as in previous instances it should become less daunting to identify the relevant considerations that inform judicial regulation of that type of state commercial activity and to position those considerations vis-à-vis one another.<sup>15</sup> Similarly, over time a network of substantive legal rules should emerge along with a clearer understanding of the relationship between those rules and the relationship between the rules and the considerations they respond to. Furthermore, previous outcomes remain part of the dialectical model and form part of subsequent processes to generate outcomes in terms of this model.<sup>16</sup> The relationships between historical states of the system and the current state form part of the network of relationships, which constitutes the model. However, these networks must remain open and contextually contingent. While it may become clearer what the relationships between various considerations and legal rules are, those relationships and the resultant application of specific forms of legal regulation should never be viewed as inevitable or natural. They should be expressly justified in every single case. The goal of the approach suggested here is not to simply develop a substitute classification approach with “more accurate” classification criteria or to develop a law of public contracts where new hard rules will crystallise over time that apply to a new legal concept, namely a state or public contract.

It should be clear that this model does not deny or obfuscate the choice of the individual judge in a particular case to apply specific regulatory measures to that instance of state commercial activity. This model places judicial choice centre stage in the regulatory approach. It requires of regulators to openly justify their choices with direct reference to the considerations that inform the regulatory measures applied. In this manner

---

<sup>15</sup> The jurisprudence developed under the current classification approach may already yield significant insights in this regard if that jurisprudence is analysed with reference to the underlying considerations that motivate the particular classifications as I attempted to do in chapter three above. The classification criteria that emerge from such an analysis augmented by relevant constitutional provisions form the basis of this network of informing considerations. The main challenge that remains is to develop an understanding of the relationship between these considerations.

<sup>16</sup> See Cilliers *Complexity and Postmodernism* 11.

the model allows us to engage in debate about the substantive issues that motivate specific legal controls.

This approach aligns at the level of judicial methodology with the project of transformative constitutionalism as formulated by Klare.<sup>17</sup> It forces the judicial process and by extension the law to be open and clear about the factors that inform legal involvement in social practices. It is an approach that demands justification for every legal intervention in a manner that invites public debate rather than stifles it.

### **3.2 Considerations in developing a new model**

One can identify a number of considerations that are relevant in the development of a new model of judicial regulation of state commercial activity. These considerations fulfil a dual function in the analysis. On the one hand, they inform the development of the model itself. These considerations can assist to distinguish between and to assess various models in order to determine their viability and to establish which one will be best suited to the South African context. On the other hand, these considerations inform judicial choice within the model. They are thus elements or components of the model. In terms of complexity theory they can be understood as the nodes that form the relational network, which constitute (part of) the model. In this latter sense, the considerations outlined below, along with the criteria I identified in the analysis of the courts' current classification approach,<sup>18</sup> are some of the factors that the judicial regulator must directly and openly assess when deciding which legal rules to apply in a given instance. They all impact in a complex way on the determination of how public and how private a given instance of state commercial activity is.

The brief description of the considerations below should not be viewed as a purely analytical exercise. I am not suggesting that one can develop understanding and construct a model of the judicial regulation of state commercial activity by taking the system apart and analysing the constituent

---

<sup>17</sup> Klare (1998) 14 *SAJHR* 146.

<sup>18</sup> See chapter three at par 3 and par 2.1 above.

parts.<sup>19</sup> Since we are dealing with a complex system it is important to carefully consider the relationships between the various constituent parts.<sup>20</sup> However, in the brief descriptions that follow I will not attempt any significant analysis of those relationships. Such an analysis will undoubtedly be an extensive exercise and requires further research. My goal here is simply to identify some of the considerations relevant in the current context thereby suggesting a way forward in the development of a new model.

### **3.2.1 Conceptions of the state**

The view one takes of the state, its nature and function, plays a critical role in fashioning controls of state action. This point manifests in a number of considerations relevant to the development of a model of judicial regulation of state commercial activity. These considerations relate *inter alia* to the formal capacity of the state, to the boundaries of what is understood as part of the state and to the relationship between the different branches of the state. In South Africa it seems that there is still considerable uncertainty about many of these considerations. While constitutionalisation maintained the existing South African state, it fundamentally altered the nature of the state. South African law has not yet come to grips with this fundamental change.

#### **3.2.1.1 Capacity**

The uncertainty regarding the nature of the state is illustrated by the Constitutional Court's ambivalence regarding the powers of the state, which emerges from a comparison of the judgements in *President of the Republic of South Africa and Another v Hugo*<sup>21</sup> and *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others*.<sup>22</sup> While the court held

---

<sup>19</sup> See Cilliers *Complexity and Postmodernism* 1 – 2, 9 – 20 on the limitations of the analytical method when studying complex systems.

<sup>20</sup> Cilliers *Complexity and Postmodernism* 10: "A complex system cannot be reduced to a collection of its basic constituents, not because the system is not constituted by them, but because too much of the relational information gets lost in the process."

<sup>21</sup> 1997 4 SA 1 (CC).

<sup>22</sup> 2001 3 SA 1151 (CC).

in the former judgement that “there are no powers derived from the royal prerogative which are conferred upon the President other than those enumerated in s 82(1) [of the 1993 Constitution]”<sup>23</sup> it ruled in the latter judgement that the government “as owner of property” has the same powers as “any other owner.”<sup>24</sup> It seems that there is no clarity regarding the metamorphosis of the pre-1994 state into the current conception of the state. In its pre-1994 character the executive branch of the state only had legislative and prerogative powers. Following the abolition of all prerogative powers not expressly listed in the Constitution it seems to follow that the executive now only has legislative (including constitutional) powers. This, however, is not the view endorsed by the Constitutional Court in *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others*.<sup>25</sup> The question is whether the state has a general capacity to act to the extent that it is not limited by the Constitution or legislation or whether the state has only those powers granted by the Constitution or legislation.

Closely linked to the questions regarding the source of the state’s powers is the view one takes of the function of the state. It is possible to approach the state’s capacity to act in functional terms. Accordingly, the state will have a general capacity to act in pursuit of legitimate state functions. However, far from resolving the difficulties regarding the state’s powers this approach simply translates the dilemma into functional terms. The question becomes: what are legitimate state functions?

With respect to the nature and function of the state it is important to keep the relational character of the model in mind. In order to fashion appropriate regulation of state commercial activity it seems imperative to have a clear view of the nature and function of the state, but the regulation of state commercial activity plays a critical role in creating that nature and function.<sup>26</sup>

---

<sup>23</sup> *President of the Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC) at par 8.

<sup>24</sup> *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 3 SA 1151 (CC) at par 40.

<sup>25</sup> 2001 3 SA 1151 (CC).

<sup>26</sup> This is again illustrated by the judgement in *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 3 SA 1151 (CC). By regulating the state’s



The judicial regulation and the nature/function considerations are thus in a reciprocal relationship, which should be carefully taken into account when fashioning a regulatory approach to state commercial activity. It means at least that courts cannot simply point to an averred nature or function of the state to justify the application of a certain set of rules.

### **3.2.1.2 Relationship between the different branches of state**

The newly found power of South African courts as guardians of the supreme Constitution raises important questions regarding the proper relationship between different branches of the state, especially the relationship between the executive and judicial branches. This relationship is a critically important consideration in both the development of a new model and of judicial choice within the model. The increased power of courts in their oversight of executive action necessitates a model where courts are forced to be reflective about their relationship with the executive branch and to openly justify the reasons for intervention in particular cases.

### **3.2.1.3 Signals of faith or mistrust**

Cynthia Farina argues convincingly that the way in which one approaches the regulation of state conduct reveals deep-seated attitudes towards the state.<sup>27</sup> She notes:

One goal of administrative law, the goal of controlling power, is rooted in mistrust. It suspects that discretion will be abused and prerogative perverted. This goal leads us to hold regulatory government on a short leash, wrapping agency decision-making in tightly constraining procedure and being quick to second-guess agency judgment. The other goal, the goal of facilitating power, is rooted in faith. It believes in the capacity of public regulatory institutions to solve social and economic problems.

---

use of its property on a par with other property owners, the state is equated in nature (in this context) with all other property owners.

<sup>27</sup> Farina (2004) 19 *SAPR/PL* 489 at 501 – 502.

This goal leads us to allow administrative government room to breathe, understanding that appropriate agency process may look very different from the familiar common-law models, and accepting that the answers agencies reach to regulatory problems may appropriately be very different than the answers reviewing bodies might reach.<sup>28</sup>

The same analysis applies to the judicial approach to state commercial activity. One's faith in or mistrust of the state will inevitably have a significant impact on the approach one favours in relation to the judicial regulation of state conduct. *Vice versa* the approach one adopts reveals such faith or mistrust. Apart from a debate about what the proper stance of courts vis-à-vis public administration should be, ie what level of trust should dictate the courts' point of departure, these signals of faith or mistrust hold significant implications for the regulated entity's response. As Farina notes: "Psychological studies have confirmed that a person's performance can change significantly depending on the signals she receives from her social environment about her presumed motives and competences."<sup>29</sup> For judicial regulation of state commercial activity to be effective, ie to succeed in its instrumental purpose of intentionally "attempting to control, order or influence

---

<sup>28</sup> Farina (2004) 19 *SAPR/PL* 489 at 502.

<sup>29</sup> Farina (2004) 19 *SAPR/PL* 489 at 504 (footnotes omitted). She continues to note: "If a system of administrative law repeatedly tells the real human beings who *are* the agency that it assumes they will misuse their power and abuse their discretion most of the time, the psychological literature says: Do not be surprised if that is exactly what they tend to do." This realisation becomes more critical in the context of state action if one keeps in mind the arguments advanced by Stiglitz in Hardiman & Mulreany (eds) *Efficiency & Effectiveness in the Public Domain* 43 – 44 that public employees respond more adversely to negative signals. Stiglitz contrasts negative signals, "the failure to deliver some promised service", with positive signals such as positive performance eg "a reduction in the cost of providing a service" and argues that since positive signals are "hard to detect" while negative ones are "more easily observed", especially in the public sector, linked to higher levels of risk aversion on the part of state employees, "we would expect government workers to take strong actions to reduce the occurrence of these negative signals and/or to reduce the blame which is assigned to them for these occurrences ... [which] may partly account for the 'red tape' often associated with public bureaucracies, the seeming excess reliance on 'bureaucratic' procedures."

the behaviour of others”,<sup>30</sup> it is therefore important for judges to be aware of the signals their approach generate and to take these signals into careful consideration.

### **3.2.2 State commercial action as an instrument of policy**

In South Africa state commercial activity functions as a significant instrument for the implementation of public policy. Especially transformation objectives such as black economic empowerment and affirmative action are notably pursued by means of commercial conduct. This has important implications for the judicial regulation of state commercial activity. Courts should carefully scrutinize instances of state commercial activity to ascertain what the exact nature and purpose of the particular action is. A significant policy dimension in a particular state commercial action may suggest different treatment of that action than comparable action that does not have a similar policy dimension. The measure of policy involved may also hold important implications for an assessment of the relationship between the court and the executive in the particular instance.

### **3.2.3 Government efficiency and effectiveness**

Government efficiency and effectiveness enjoy constitutional status as important values of public administration in South Africa. In the light of enormous socio-economic needs to be addressed within severe public budget constraints a high premium on government efficiency and effectiveness also seems to be common sense. It is accordingly important that the judicial regulation of state commercial activity should not be too onerous. By focusing on these considerations one can also clearly assess the cost of privileging countervailing considerations.

---

<sup>30</sup> See the definition of the term “regulation” in chapter one at par 5.3 above.

### **3.2.4 Certainty**

In a commercial context certainty is an important consideration. This also applies to the legal rules applicable to commercial transactions. Parties need to have certainty in relation to what the law requires of them and how their transaction will be treated by a court. The need for certainty must therefore be carefully considered in developing a model of the judicial regulation of state commercial activity. Especially the relationship between certainty and flexibility or variability introduced by a more open and contextually contingent approach must be considered. There seems to be a tension between the degree of openness and flexibility of the proposed model and the degree of certainty required to ensure that courts are effective regulators, ie that judicial decisions can steer general state conduct.

It is, however, important to resist a dichotomous view of certainty that only allows for absolute, objective certainty or radical subjectivity. Certainty itself can also be viewed in much more fluid terms. Henk Botha shows how experientialism can ground our conceptual system while rejecting absolute and unconditional positions.<sup>31</sup>

### **3.2.5 Constitutional transformation**

Constitutional transformation plays a critical role in all legal development in South Africa. This must also be true of the development of a model of judicial regulation of state commercial activity. Constitutional transformation impacts on both the development of a model and on judicial choice within the model. The Constitution envisages a judiciary that is reflective about its own role in a new South African society. It requires judges to justify their choices with reference to societal values as expressed in the Constitution. The judicial process must invite dialogue and not close it off. These imperatives call for a model that is open, dialogical and honest about the existence of judicial choice and the true motivations for those decisions. Botha eloquently formulates these considerations as follows:

---

<sup>31</sup> See Botha 2002 *TSAR* 612 at 616 – 617.

The challenge, it seems, is not to eliminate categorisation from constitutional adjudication (that would be impossible), but to reconceive categorisation in relational terms. Such an approach must break with the objectivist assumption that our categories mirror reality, or that we can decide cases correctly and objectively by fitting them into the right category. It must acknowledge that our concepts and categories are products of human experience and imagination, which may need to be remodelled and re-imagined in the light of changing circumstances and new experiences.<sup>32</sup>

The Constitution also demands a transformed public administration and contains a number of values that must guide all state action. These include transparency, accountability, equity and fairness.

#### **4 Conclusion**

As Henk Botha notes in the extract quoted in the previous paragraph it does not seem possible to completely eliminate categorisation from the legal process. My analysis of the various potential models of judicial regulation of state commercial activity suggests that this is also true in the present context. A sensible response to this realisation is to focus attention on the choice that constitutes categorisation in the legal process. That choice lies with both judges and organs of state when engaging in state commercial activity.

The best approach for judges when faced with instances of state commercial activity is to make a choice regarding what legal rules to apply with open and direct reference to the substantive considerations that inform both the applicability and substance of the particular rules. Sustained, consistent and articulated reference to these considerations is the main difference between the approach proposed here and the competing models, such as the current classification approach, the development of specific

---

<sup>32</sup> Botha 2003 *TSAR* 20 at 31 (footnotes omitted).

contract law rules for public contracts and differentiated application of public law rules based on classifications of state functions. Suggestions that such an open-ended approach may in the long run result in new substantive rules must also be resisted, because of the danger that the motivating considerations may again fade into the background and cause a relapse to the objectionable conceptualism that characterises the current classification approach. The proposed approach must remain much more flexible. That is what the regulation of a complex reality demands. By resisting assimilation and maintaining constant differentiation between successive analogous cases of state commercial activity, judges can introduce “much greater normative complexity into [their] reasoning processes.”<sup>33</sup>

This does not mean that there must be large-scale uncertainty. It may be perfectly possible to formulate the individual informing considerations clearly enough to establish certainty from a design perspective eg the consideration of superior power identified in the form of specific terms. However, the demand for certainty should not be overemphasised. As my analysis of the various models indicated it is not possible to achieve absolute certainty, or anything close to it, in any of the models. Part of the acceptance of an open model is to accept Paul Cilliers’s conclusion that “dealing with complexity is a little messy.”<sup>34</sup> Given the complex nature of the social reality that the legal system aims to model, it is not possible to construct a model that will provide us with high levels of certainty. Put differently, “[w]e cannot ‘calculate’ the performance of ... complex social systems in their complexity.”<sup>35</sup> Cilliers argues that this means that there will always be creativity involved in dealing with complex systems,<sup>36</sup> which links with Henk Botha’s argument that “our [legal] concepts and categories are products of

---

<sup>33</sup> See Collins *Regulating Contracts* 50, where he argues for such greater normative complexity when contract law differentiates more readily between different contexts of contractual arrangements.

<sup>34</sup> Cilliers (2005) 22 *Theory, Culture & Society* 255 at 261.

<sup>35</sup> Cilliers (2005) 22 *Theory, Culture & Society* 255 at 264.

<sup>36</sup> Cilliers (2005) 22 *Theory, Culture & Society* 255 at 264.

human experience and *imagination*.”<sup>37</sup> An optimum model of judicial regulation of state commercial activity should thus create scope for this creativity and for “a careful and responsible development of the imagination.”<sup>38</sup> An open and flexible model seems to be the best way to achieve this. Reduced certainty is undoubtedly a risk of such an open model, but as Cilliers notes: “Imagining the future will involve risk, but the nature of this risk will be a function of the quality of our imagination.”<sup>39</sup> Rather than restricting the model to reduce its openness, eg by arguing for the crystallization or ossification of legal rules over an extended period of applying open norms to recurring fact-patterns, we should maintain the openness or perhaps even the instability of the model in order to foster creativity and imagination.

In the regulatory model I am suggesting choice does not only reside with judges. The analysis of the criteria used within the current classification approach already indicated that administrators have a significant impact on which legal rules will apply to particular instances of state commercial activity. In constructing a proper constitutional relationship between organs of state and courts, as part of the development of a new model in the present context, it is important that such choices of administrators receive adequate

---

<sup>37</sup> Botha 2003 *TSAR* 20 at 31 (my emphasis).

<sup>38</sup> Cilliers (2005) 22 *Theory, Culture & Society* 255 at 264.

<sup>39</sup> Cilliers (2005) 22 *Theory, Culture & Society* 255 at 264.

consideration. Insights flowing from public choice theory<sup>40</sup> can assist us in developing a better understanding of how and why administrators make specific choices in public administration. This does not only assist in developing better insight into the reasons why administrators would want to manipulate criteria in order to have specific legal rules govern their commercial activity, but also more generally why administrators would choose to pursue their functions by means of commercial activity. This area is one where significant further research in South Africa is needed. As Susan Rose-Ackerman notes:

What is needed is a broad-based, collaborative effort, by economists, lawyers and political scientists ... Economists, policy analysts, and political scientists should actively collaborate with public lawyers on pedagogical and scholarly projects. Integration should occur both at the level of high

---

<sup>40</sup> Public choice theory can be described as second generation law and economics scholarship. It explores the motives that drive public decision-making and takes a particularly pessimistic view of public processes. Rachlinski & Farina (2002) 87 *Cornell LR* 549 at 563 state: "Common to all analyses labeled 'public choice' is the core concept, taken from economic thought, of instrumental rationality: The individual will order his behavior so as to maximize the likelihood of achieving his individually defined goals." They further argue that "the paradigmatic public choice theory of legal analyses ... adds to the assumption of instrumental rationality the further assumption that the goal of human actors is advancing individual material self-interest." Public choice theory thus suggests that public processes are often dominated by "small interest groups seeking to advance their own special interests, frequently at the expense of the public good": Minda *Postmodern Legal Movements* 97. Despite its pessimistic view of public processes, for which it is often criticised, public choice theory can be useful in the way that it develops a model for understanding choice within public administration. As Rachlinski & Farina (2002) 87 *Cornell LR* 549 note at 552: "For [public choice analysts] the goal of those who design government institutions should be to discover when and how individual self-serving desires can be channeled toward public-serving ends ... By thus offering both a descriptive and a normative theory of government, public choice responds powerfully to the need to understand why regulatory policymaking and execution go wrong." See also Rose-Ackerman (1988) 98 *Yale LJ* 341 at 344 – 346, 347: "[P]ublic choice scholars can provide analyses of bureaucratic and legislative institutions that are directly relevant to judges concerned with procedural fairness."



theory, where the underlying structures of the state are at issue, and at the level of concrete policy, where detailed, fact-bound analyses are essential.<sup>41</sup>

While the more complex model suggested here may not yield dramatically different substantive outcomes than the current classification approach to the judicial regulation of state commercial activity, the methodology of the new, refined model differs vastly from the current one. The different methodology is of critical importance in the South African context of transformative constitutionalism. It takes the “infringed interests of the plaintiff seriously”<sup>42</sup> and essentially does not close off the debate, thereby denying the sacrifice or harm caused, as the other approaches do. As a result it creates the possibility for community in “[t]he recognition of the legitimate will of the other in the face of social conflict” that Van der Walt & Botha argue “is a prerequisite for community if *community* is to be understood as a *relation with* someone other than the self.”<sup>43</sup> The methodology of the proposed model recognise[s] that there are different ways of looking at the world; that legal distinctions do not reflect pre-existing boundaries, but depend on the perspective of those making them; that the idea

---

<sup>41</sup> Rose-Ackerman (1988) 98 *Yale LJ* 341 at 348, 368. See also the compelling arguments made by Farina (2004) 19 *SAPR/PL* 489 at 492 – 495 regarding the need to do empirical research “on how legal rules and principles actually affect agency behaviour and culture, in the field and over time” as a critical dimension of developing improved models of judicial control of state conduct.

<sup>42</sup> See Van der Walt & Botha (2000) 7 *Constellations* 341.

<sup>43</sup> Van der Walt & Botha (2000) 7 *Constellations* 341 at 352.

of justice that is blind and therefore neutral with regard to competing conceptions of the good invariably privileges certain ways of seeing over others.<sup>44</sup>

This recognition lies at the heart of a culture of justification and transformative constitutionalism in South Africa.

---

<sup>44</sup> Botha 2003 *TSAR* 20 at 25.

## BIBLIOGRAPHY

- Alder J "Hunting the Chimera - the End of *O'Reilly v Mackman*" (1993) 13 *Legal Studies* 183
- Allan TRS "Procedural Fairness and the Duty of Respect" (1998) 18 *OJLS* 497
- Allison J "The Procedural Reason for Judicial Restraint" 1994 *Public Law* 452
- Apelt W *Der verwaltungsrechtliche Vertrag* (1964) Aalen
- Arnould J "French Public Contracts Law After the Reform of March 2001" (2001) 10 *Public Procurement LR* 324
- Arnould J "Secondary Policies in Public Procurement: The Innovations of the New Directives" (2004) 13 *Public Procurement LR* 187
- Arnould J "The French Council of State and the Reform of the Public Contracts Law of 2001" (2004) 13 *Public Procurement LR* NA6
- Arrowsmith S *Government Procurement and Judicial Review* (1988) Toronto
- Arrowsmith S "Ineffective Transactions and Unjust Enrichment: A Framework for Analysis" (1989) 9 *Legal Studies* 121
- Arrowsmith S "Ineffective Transactions, Unjust Enrichment and Problems of Policy" (1989) 9 *Legal Studies* 307
- Arrowsmith S "Government Contracts and Public Law" (1990) 10 *Legal Studies* 231
- Arrowsmith S "Judicial Review and the Contractual Powers of Public Authorities" (1990) 106 *LQR* 277
- Arrowsmith S "Enforcing the EC Public Procurement Rules: The Remedies System in England and Wales" (1992) 1 *Public Procurement LR* 92
- Arrowsmith S *Civil Liability and Public Authorities* (1992) Winteringham
- Arrowsmith S "Protecting the Interests of Bidders for Public Contracts: The Role of the Common Law" (1994) 53 *Cambridge LJ* 104
- Arrowsmith S "Public Procurement as an Instrument of Policy and the Impact of Market Liberalisation" (1995) 111 *LQR* 235
- Arrowsmith S "The Past and Future Evolution of EC Procurement Law: From Framework to Common Code?" (2006) 35 *Public Contract Law Journal* 337

- Arrowsmith S (ed) *Public Procurement in the European Community: Volume IV. Remedies for Enforcing the Public Procurement Rules* (1993) Winteringham
- Arrowsmith S, Linarelli J & Wallace D Jr. *Regulating Public Procurement* (2000) The Hague
- Atiyah PS *The Rise and Fall of Freedom of Contract* (1979) Oxford
- Auditor-General *General Report of the Auditor-General on Audit Outcomes for the Financial Year 2005-06* (2006)
- Auditor-General *Quarterly Report of the Auditor-General on the Submission of Financial Statements by Municipalities and the Status of Audit Reports as at 31 December 2006 for the Financial Year ended 30 June 2006* (2007)
- Autexier CJ "Verträge und Absprachen zwischen der Verwaltung und Privaten in Frankreich" (1993) 52 *VVDStRL* 285
- Bailey SH "Judicial Review and the Public Procurement Regulations" (2005) 14 *Public Procurement LR* 291
- Bailey SH "Judicial Review of Contracting Decisions" 2007 *Public Law* 444
- Bamforth N "The Scope of Judicial Review: Still Uncertain" 1993 *Public Law* 239
- Bamforth N & Leyland P (eds) *Public Law in a Multi-Layered Constitution* (2003) Oxford
- Barnard AJ *A Critical Legal Argument for Contractual Justice in the South African Law of Contract* (2005) dissertation University of Pretoria
- Barrie GN "Judicial Review of the Royal Prerogative" (1994) 111 *SALJ* 788
- Baxter L "'The State' and Other Basic Terms in Public Law" (1982) 99 *SALJ* 212
- Baxter L *Administrative Law* (1984) Cape Town
- Beatson J "'Public' and 'Private' in English Administrative Law" (1987) 103 *LQR* 34
- Beatson J "Restitution of Taxes, Levies and Other Imposts: Defining the Extent of the *Woolwich* Principle" (1993) 109 *LQR* 401
- Beatson J "Finessing Substantive 'Public Law' Principles into 'Private Law' Relations" 1997 *Acta Juridica* 1

- Beatson J & Friedman D (eds) *Good Faith and Fault in Contract Law* (1995) Oxford
- Beinart B "A Note on the Crown Liabilities Act" (1952) 15 *THRHR* 162
- Beinart B "Sovereignty and the Law" (1952) 15 *THRHR* 101
- Beinart B "The Legal Relationship between the Government and its Employees" 1955 *BSALR* 21
- Beinart B "The English Legal Contribution in South Africa: the Interaction of Civil and Common Law" 1981 *Acta Juridica* 7
- Bell JS *French Constitutional Law* (1992) Oxford
- Bellamy R, Bufacchi V & Castiglione D (eds) *Democracy and Constitutional Culture in the Union of Europe* (1995) London
- Benn SI & Gaus GF (eds) *Public and Private in Social Life* (1983) London & Canberra
- Bennett TW *et al* (eds) *Administrative Law Reform* (1993) Kenwyn
- Bill of Rights Compendium* (2005) Durban
- Black J "Critical Reflections on Regulation" (2002) 27 *Australian Journal of Legal Philosophy* 1
- Black J "Constitutionalising Self Regulation" (1996) 59 *MLR* 24
- Black J, Muchlinksi P & Walker P (eds) *Commercial Regulation & Judicial Review* (1998) Oxford
- Black JM "'Which Arrow?': Rule Type and Regulatory Policy" 1995 *Public Law* 94
- Black JM "Talking about Regulation" 1998 *Public Law* 77
- Blackman MS, Jooste RD & Everingham GK *Commentary on the Companies Act Volume I* (2002) Lansdowne
- Blackstone W *Commentaries on the Laws of England* (1957) New York
- Bolton P "Government Contracts and the Fettering of Discretion - A Question of Validity" (2004) 19 *SAPR/PL* 90
- Bolton P "Government Dealings and the Intention to Create Legal Relations" (2004) 16 *SA Merc LJ* 198
- Bolton P "The Use of Government Procurement as an Instrument of Policy" (2004) 121 *SALJ* 619
- Bolton P *The Legal Regulation of Government Procurement in South Africa* (2005) dissertation University of the Western Cape

- Bolton P "Scope for Negotiating and/or Varying the Terms of Government Contracts Awarded by way of a Tender Process" (2006) 17 *Stell LR* 266
- Bolton P "The Exclusion of Contractors from Government Contract Awards" (2006) 10 *Law, Democracy and Development* 25
- Bolton P *The Law of Government Procurement in South Africa* (2007) Durban
- Bonk HJ "Fortentwicklung des öffentlich-rechtlichen Vertrags unter besonderer Berücksichtigung der Public Private Partnerships" (2004) 119 *DVBl* 141
- Booyesen H *Die Toepassing van Volkereg in die Suid-Afrikaanse Reg: 'n Staatsregtelike Ondersoek* (1974) dissertation University of Port Elizabeth
- Booyesen H "A Survey of Legal Relations Flowing from State Agreements" (1984) 9 *SAYIL* 56
- Borrie G "The Regulation of Public and Private Power" 1989 *Public Law* 552
- Botha H "Vonnisbespreking: Public Carriers Association v Toll Road Concessionaries (Pty) Ltd 1990 1 SA 925 (A)" (1990) 5 *SAPR/PL* 138
- Botha H "Democracy and Rights: Constitutional Interpretation in a Postrealist World" (2000) 63 *THRHR* 561
- Botha H "Metaphoric Reasoning and Transformative Constitutionalism (Part I)" 2002 *TSAR* 612
- Botha H "Metaphoric Reasoning and Transformative Constitutionalism (Part II)" 2003 *TSAR* 20
- Botha TG "'n Konstitusionele Evaluering van die Beperking van Regsgedinge teen die Staat" (1994) 9 *SAPR/PL* 22
- Boulle L "Elements in the Crucible Developing Public Law for the Future" (1987) 104 *SALJ* 104
- Boulle L, Harris B & Hoexter C *Constitutional and Administrative Law* (1989) Kenwyn
- Brassey M *et al Commentary on the Labour Relations Act* (1999) Cape Town
- Breytenbach A "The Sources of Administrative Power: The Impact of the 1993 Constitution on the Issues Raised by Dilokong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Departement van Handel en Nywerheid 1992 4 SA 1 (A)" (1994) 5 *Stell LR* 187, 276
- Brown LN & Bell JS *French Administrative Law* (5th ed, 1998) Oxford

- Brownsword R, Hird NJ & Howells G (eds) *Good Faith in Contract* (1999) Aldershot
- Bullinger M *Vertrag und Verwaltungsakt* (1962) Stuttgart
- Burchell JM *The Law of Defamation in South Africa* (1985) Cape Town
- Burdzik A "Public Benefit and the Prescription of Public Debts" (1984) 47 *THRHR* 89
- Burns Y "Government Contracts and the Public/Private Divide" (1998) 13 *SAPR/PL* 234
- Burns Y *Administrative Law under the 1996 Constitution* (2nd ed, 2003) Durban
- Burns Y & Beukes M *Administrative Law under the 1996 Constitution* (3rd ed, 2006) Durban
- Cane P "Do Banks Dare Lend to Local Authorities?" (1994) 110 *LQR* 514
- Carpenter G *Introduction to South African Constitutional Law* (1987) Durban
- Carpenter G "Prerogative Powers - an Anachronism?" (1989) XXII *CILSA* 190
- Cheadle MH, Davis DM & Haysom NRL (eds) *South African Constitutional Law: The Bill of Rights* (2nd ed, 2005) Durban
- Christodoulidis EA *Law and Reflexive Politics* (1998) Dordrecht
- Cilliers HS *et al Korporatiewe Reg* (2nd ed, 1992) Durban
- Cilliers P *Complexity and Postmodernism* (1998) London & New York
- Cilliers P "Complexity, Deconstruction and Relativism" (2005) 22 *Theory, Culture & Society* 255
- Claassen CJ *Dictionary of Legal Words and Phrases* (2006) Durban
- Cloete JJN "Public Enterprises in South Africa: Administrative Aspects" (1978) 13 *Journal for Public Administration* 1
- Cockrell A "Substance and Form in the South African Law of Contract" (1992) 109 *SALJ* 40
- Cockrell A "Second-Guessing Contractual Power on Rationality Grounds" 1997 *Acta Juridica* 26
- Coertze LI "Watter Regssisteem Beheers die Verhouding tussen Owerheid en Onderdaan in die Unie, Romeins-Hollandse Reg of Engelse Reg?" (1937) 1 *THRHR* 34
- Coertze LI "Die Posisie van die Koning as Hoof van die Uitvoerende Gesag van die Unie" (1939) 3 *THRHR* 250

- Coertze LI "Die Wetgewende Orgaan van die Unie van Suid-Afrika" (1940) 4 *THRHR* 246
- Coetzee JP "Die Ontstaan en Voortbestaan van Spesiale Formele Voorvereistes vir Eise teen die Staat" 1980 *TSAR* 245
- Collins H *Regulating Contracts* (1999) Oxford
- Collins H *The Law of Contract* (4th ed, 2003) London
- Collins L (ed) *Dicey and Morris on The Conflict of Laws* (13th ed, 2000) London
- Corder H "The Content of the *Audi Alteram Partem* Rule in South African Administrative Law" (1980) 43 *THRHR* 156
- Corder H & Maluwa T (eds) *Administrative Justice in Southern Africa* (1997) Cape Town
- Cotterrell R *The Politics of Jurisprudence* (1989) London
- Craig P "Ultra Vires and the Foundations of Judicial Review" (1998) 57 *Cambridge LJ* 63
- Craig P "Competing Models of Judicial Review" 1999 *Public Law* 428
- Craig P & Rawlings R (eds) *Law and Administration in Europe* (2003) Oxford
- Craig P & Tomkins A (eds) *The Executive and Public Law* (2006) Oxford
- Craig PP *Administrative Law* (5th ed, 2003) London
- Currie I & De Waal J *The New Constitutional and Administrative Law Volume I Constitutional Law* (2001) Lansdowne
- Currie I & De Waal J *The Bill of Rights Handbook* (5th ed, 2005) Lansdowne
- Currie I & Klaaren J *The Promotion of Administrative Justice Act Benchbook* (2001) Cape Town
- Daintith T "Regulation by Contract: The New Prerogative" (1979) 32 *Current Legal Problems* 41
- Daintith T "Legal Analysis of Economic Policy" (1982) 9 *Journal of Law and Society* 191
- Daintith T (ed) *Law as an Instrument of Economic Policy: Comparative and Critical Approaches* (1988) Berlin & New York
- Davenport BJ "Obligation to Consider Tenders" (1991) 107 *LQR* 201
- David R (ed) *International Encyclopedia of Comparative Law Volume II The Legal Systems of the World Their Comparison and Unification* (1975) Tubingen



- Davies ACL *Accountability: A Public Law Analysis of Government by Contract* (2001) Oxford
- Davies ACL "Ultra Vires Problems in Government Contracts" (2006) 122 *LQR* 98
- Davis KC *Discretionary Justice, a Preliminary Inquiry* (1969) Baton Rouge
- De Smith SA, Woolf H & Jowell J *Judicial Review of Administrative Action* (5th ed, 1995) London
- De Ville JR *Constitutional & Statutory Interpretation* (2000) Cape Town
- De Ville JR *Judicial Review of Administrative Action in South Africa* (2003) Durban
- De Ville JR "Proportionality as a Requirement of the Legality in Administrative Law in terms of the New Constitution" (1994) 9 *SAJHR* 360
- De Vos W *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (3rd ed, 1987) Kenwyn
- De Wall H *Die Anwendbarkeit privatrechtlicher Vorschriften im Verwaltungsrecht* (1999) Tübingen
- De Wet JC "Die Resepsie van die Romeins-Hollandse Reg in Suid-Afrika" (1958) 21 *THRHR* 84
- De Wet JC "'Nederlandse' Reg in Suid-Afrika tot 1806" (1958) 21 *THRHR* 162
- De Wet JC "Die Romeins-Hollandse Reg in Suid-Afrika na 1806" (1958) 21 *THRHR* 239
- De Wet JC & Van Wyk AH *Kontraktereg & Handelsreg* (5th ed, 1992) Durban
- Department of Housing *Annual Report 2005-2006* (2006)
- Department of Housing *White Paper on a New Housing Policy and Strategy for South Africa* 1994 (www.gov.za, 14 November 2006)
- Devenish GE *Interpretation of Statutes* (1992) Kenwyn
- Dicey AV *An Introduction to the Study of the Law of the Constitution* (10th ed, 1959) London
- Dlamini CRM *The Administrative Law of a Typical South African University* (1994) dissertation University of the Western Cape
- D'Oliviera JA van S *State Liability for the Wrongful Exercise of Discretionary Powers* (1976) dissertation UNISA
- Dötsch W "Schuldrechtsmodernisierung und öffentliches Recht" (2001) 15 *NWVBI* 385

- Dötsch W "Update: Schuldrechtsmodernisierung und öffentliches Recht" (2002) 16 *NWVB* 140
- Dötsch W "Rechtsweg bei Ansprüchen aus öffentlich-rechtlicher culpa in contrahendo" (2003) 56 *NJW* 1430
- Dowdall HC "The Word 'State'" (1923) 39 *LQR* 98
- Du Plessis JJ, McConvill J & Bagaric M *Principles of Contemporary Corporate Governance* (2005) Cambridge
- Du Plessis LM "The Genesis of the Provisions concerned with the Application and Interpretation of the Chapter on Fundamental Rights in South Africa's Transitional Constitution" 1994 *TSAR* 706
- Du Plessis SJ *Die Begrippe Openbare Beleid en Openbare Belang as Kriterium vir Kontraktuele Geregtigheid* (1999) dissertation University of Potchefstroom
- Du Toit D et al *Labour Relations Law* (3rd ed, 2000) Durban
- Dugard J *International Law A South African Perspective* (2nd ed, 2001) Lansdowne
- Dyson KHF *The State Tradition in Western Europe* (1980) Oxford
- Dyzenhaus D "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) 14 *SAJHR* 11
- Ehlers D *Verwaltung in Privatrechtsform* (1984) Berlin
- Ehlers D "Die wirtschaftliche Betätigung der öffentlichen Hand in der Bundesrepublik Deutschland" (1990) 45 *JZ* 1089
- Eiselen GTS "Herlewing van die Algemene Verrykingsaksie" (1992) 55 *THRHR* 124
- Emery CT & Smythe B *Judicial Review: Legal Limits of Official Power* (1986) London
- Erasmus HJ "Roman Law in South Africa Today" (1989) 106 *SALJ* 666
- Erichsen H "Die Nichtigkeit und Unwirksamkeit verwaltungsrechtlicher Verträge" (1994) 16 *Jura* 47
- Erichsen H *Gemeinde und Private im wirtschaftlichen Wettbewerb* (1987) Heidelberg
- Erichsen H & Ehlers D (eds) *Allgemeines Verwaltungsrecht* (13th ed, 2006) Berlin

- Farina CR "Administrative Law as Regulation: The Paradox of Attempting to Control and to Inspire the Use of Public Power" (2004) 19 *SAPR/PL* 489
- Ferreira GM "Regmatige Owerheidsoptrede, Prerogatiwe en die Individu" (1988) 3 *SAPR/PL* 150
- Ferreira GM "'Estoppel by representation' in die Publiekreg" (1991) 54 *THRHR* 388
- Floyd TB *Die Owerheidsooreenkoms - 'n Administratiefregtelike Ondersoek* (1994) dissertation UNISA
- Floyd T "The Capacity of Government to Conclude Contracts: Still an Unlimited Power?" (2005) 20 *SAPR/PL* 378
- Floyd T "Appropriation of Funds as a Requirement for the Validity of Government Contracts Involving the Spending of Public Funds" (2006) 21 *SAPR/PL* 161
- Forsyth C "The Scope of Judicial Review: 'Public Duty' not 'Source of Power'" 1987 *Public Law* 356
- Forsyth CF (ed) *Judicial Review & The Constitution* (2000) Oxford & Portland
- Forsyth CF *Private International Law: The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (4th ed, 2003) Lansdowne
- Foster NG *German Legal System & Laws* (2nd ed, 1996) London
- Fouché JJ *Die Bevoegdhede van die Staatspresident van die Republiek van Suid-Afrika* (1964) dissertation University of Stellenbosch
- Fourie JSA "Die Wisselwerking tussen Suid-Afrikaanse Maatskappyereglerstukkke" (1988) 51 *THRHR* 218
- Fourie JSA "Volmagbeperkings en Ultra Vires-Handelinge - Aspekte van Artikel 36 van die Maatskappywet in Oënskou" (1990) 1 *Stell LR* 388
- Fredman S & Morris G "Public or Private? State Employees and Judicial Review" (1991) 107 *LQR* 298
- Fredman S & Morris GS "The Cost of Exclusivity: Public and Private Re-examined" 1994 *Public Law* 69
- Freedland M "Government by Contract and Public Law" 1994 *Public Law* 86
- Freedland M "Public Law and Private Finance - Placing the Private Finance Initiative in a Public Frame" 1998 *Public Law* 288
- Freedland M & Auby J (eds) *The Public Law/Private Law Divide* (2006) Oxford

Friedmann WG "Legal Status of Incorporated Public Authorities" (1948) 22 *Australian LJ* 7

Furmston M *Cheshire, Fifoot & Furmston's Law of Contract* (14th ed, 2001) London

Garner BA (ed) *Black's Law Dictionary* (7th ed, 1999) St Paul

Garner JF "Public Law and Private Law" 1978 *Public Law* 230

Gern A "Neuansatz der Unterscheidung des öffentlichen Rechts vom Privatrecht" (1985) 18 *ZRP* 56

Gilmore G "Legal Realism: Its Cause and Cure" (1961) 70 *Yale LJ* 1037

Gilmore G *The Ages of American Law* (1977) New Haven

Glover G (ed) *Essays in Honour of AJ Kerr* (2006) Durban

Gordon RW "Critical Legal Histories" (1984) 36 *Stanford LR* 57

Griffith JAG "Public Corporations as Crown Servants" (1952) 9 *University of Toronto LJ* 169

Grogan J "Unfair Dismissal of 'Contractual' Public Sector Employees" (1990) 11 *ILJ* 655

Grogan J "Contract v Administrative Law: Dismissals in the Public Sector" (1991) 108 *SALJ* 237

Grogan J "Dismissals in the Public Sector: The Triumph of Audi?" (1991) 108 *SALJ* 599

Grogan J "Strike Dismissals in the Public Sector" (1991) 12 *ILJ* 1

Grogan J "Dismissal of Public-sector Employees: The Final Piece in the Puzzle?" (1993) 110 *SALJ* 422

Grogan J "Which Law, When and Why? (Part 1)" (2006) April *Employment Law Journal* 3

Grogan J "Which Law, When and Why? (Part II)" (2006) October *Employment Law Journal* 4

Gründling B *Modernisiertes Privatrecht und öffentliches Recht* (2006) Berlin

Grziwotz H *Vertragsgestaltung im Öffentlichen Recht* (2002) München

Gurlit E *Verwaltungsvertrag und Gesetz* (2000) Tübingen

Gurlit E "Grundlagen des Verwaltungsvertrages (Teil I)" (2001) 23 *Jura* 659

Gurlit E "Grundlagen des Verwaltungsvertrages (Teil II)" (2001) 23 *Jura* 731

Hahlo HR & Kahn E *The Union of South African: The Development of Its Laws and Constitution* (1960) London

- Hahlo HR & Kahn E *The South African Legal System and Its Background* (1968) Cape Town
- Harden I *The Contracting State* (1992) Buckingham & Philadelphia
- Hardiman T & Mulreany M (eds) *Efficiency & Effectiveness in the Public Domain* (1991) Dublin
- Harlow C "The Crown: Wrong Once Again?" (1977) 40 *MLR* 728
- Harlow C "'Public' and 'Private' Law: Definition without Distinction" (1980) 43 *MLR* 248
- Harlow C & Rawlings R *Law and Administration* (1997) London
- Harris B & Hoexter C "Administrative Law in Contractual Disguise" (1987) 104 *SALJ* 557
- Harris BV "The 'Third Source' of Authority for Government Action" (1992) 108 *LQR* 626
- Harris D & Tallon D *Contract Law Today* (1989) Oxford
- Hawthorne L "The Principle of Equality in the Law of Contract" (1995) 58 *THRHR* 157
- Hawthorne L "Closing of the Open Norms in the Law of Contract" (2004) 67 *THRHR* 294
- Hawthorne L & Thomas Ph J "Bank of Lisbon and South Africa Ltd v De Ornelas 1988 3 SA 580 (A)" (1989) 22 *De Jure* 143
- Heertje A (ed) *The Economic Role of the State* (1989) Cambridge
- Hersch J "Fair Play at Work - The Common-law Right of Public Employees to a Hearing Prior to Retrenchment" (1993) 14 *ILJ* 1131
- Himsworth CMG "In a State No Longer: The End of Constitutionalism" 1996 *Public Law* 639
- Hoexter C "The Future of Judicial Review in South African Administrative Law" (2000) 117 *SALJ* 484
- Hoexter C "Contracts in Administrative Law: Life after Formalism?" (2004) 121 *SALJ* 595
- Hoexter C "The Principle of Legality in South African Administrative Law" (2004) 4 *Macquarie LJ* 165
- Hoexter C *Administrative Law in South Africa* (2007) Cape Town
- Hoexter C with Lyster R & Currie I (ed) *The New Constitutional and Administrative Law Volume II Administrative Law* (2002) Lansdowne

- Hoffmann-Riem W & Schmidt-Aßmann E (eds) *Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen* (1996) Baden-Baden
- Hogg PW *Liability of the Crown* (1971) Melbourne
- Hogg PW *Constitutional Law of Canada* (4th ed, 1997) Scarborough
- Holoubek M "Der Staat als Wirtschaftssubjekt und Auftraggeber" (2001) 60 *VVDStRL* 513
- Hopkins K "Standard-Form Contracts and the Evolving Idea of Private Law Justice: A Case of Democratic Capitalist Justice versus Natural Justice" 2003 *TSAR* 150
- Hosten WJ, Edwards AB, Nathan C & Bosman F *Introduction to South African Law and Legal Theory* (1983) Durban & Pretoria
- HWRW "Public Law, Private Law and Judicial Review" (1983) 99 *LQR* 166
- Jäckle W "Die Haftung der öffentlichen Verwaltung aus culpa in contrahendo im Licht der oberinstanzlichen Rechtsprechung" (1990) 43 *NJW* 2520
- Jackson P & Leopold P O. *Hood Phillips and Jackson Constitutional and Administrative Law* (8th ed, 2001) London
- James JS *Stroud's Judicial Dictionary of Words and Phrases* (5th ed, 1986) London
- Jarass HD "Besonderheiten des französischen Verwaltungsrechts im Vergleich" (1981) 34 *DÖV* 813
- Joseph PA (ed) *Essays on the Constitution* (1995) Wellington
- Joubert CP "Die Gebondenheid van die Soewereine Wetgever aan die Reg" (1952) 15 *THRHR* 7
- Joubert N "Die Regsaard van die Finansiële Huurkontrak" 1989 *TSAR* 568
- Joubert WA "Die Realiteit van die Subjektiewe Reg en die Betekenis van 'n Realistiese Begrip daarvan vir die Privaatreg" (1958) 21 *THRHR* 12
- Joubert WA (ed) *The Law of South Africa* (1st ed, 1981) Durban
- Joubert WA (ed) *The Law of South Africa* (First reissue, 1999) Durban
- Jowell J "Of Vires and Vacuums: The Constitutional Context of Judicial Review" 1999 *Public Law* 448
- Jowell J & Oliver D (eds) *The Changing Constitution* (2nd ed, 1989) Oxford
- Kahn E "Constitutional Law" 1957 *Annual Survey of South African Law* 1
- Keith AB *Constitution, Administration and the Laws of the Empire* (1924) London

- Kelman M *A Guide to Critical Legal Studies* (1987) Cambridge
- Kempen B *Die Formenwahlfreiheit der Verwaltung* (1989) München
- Kemper J de B *Staatkundige Geschiedenis van Nederland tot 1795* (1866) Amsterdam
- Kennedy D "Form and Substance in Private Law Adjudication" (1976) 89 *Harvard LR* 1685
- Kennedy WPM & Schlosberg HJ *The Law and Custom of the South African Constitution* (1935) London
- Kerr AJ *The Principles of the Law of Contract* (6th ed, 2002) Durban
- Khoza RJ & Adam M *The Power of Governance Enhancing the Performance of State-Owned Enterprises* (2005) Johannesburg
- King Committee on Corporate Governance *King Report on Corporate Governance for South Africa - 2002* (2002) Parktown
- Kingsford Smith D "What is Regulation? A Reply to Julia Black" (2002) 27 *Australian Journal of Legal Philosophy* 38
- Klaaren J "Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information" (1997) 13 *SAJHR* 549
- Klaaren J "Redlight, Greenlight" (1999) 15 *SAJHR* 209
- Klare K "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146
- Klindt T "Öffentlich-rechtliche Verträge zwischen Unternehmen und Behörden als Instrument der Marktüberwachung" (2003) 22 *NVwZ* 307
- Kommers DP *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd ed, 1997) Durham & London
- Krebs W "Verträge und Absprachen zwischen der Verwaltung und Privaten" (1993) 52 *VVDStRL* 248
- Kunig P "Verträge und Absprachen zwischen der Verwaltung und Privaten" (1992) 107 *DVBl* 1193
- Labuschagne J *Staatskontrakte ter Verkryging van Goedere, Dienste en Werke* (1985) dissertation UNISA
- Langa P "Transformative Constitutionalism" (2006) 17 *Stell LR* 351
- Lange C *Unreasonableness as a Ground of Judicial Review in South Africa* (2002) Baden-Baden

- Langrod G "Administrative Contracts" (1955) 4 *American Journal of Comparative Law* 325
- Le Roux W "Bridges, Clearings and Labyrinths: The Architectural Framing of Post-apartheid Constitutionalism" (2004) 19 *SAPR/PL* 629
- Lewis C "The demise of the exceptio doli generalis: is there another route to contractual equity?" (1990) 107 *SALJ* 26
- Lorenz D "Der Wegfall der Geschäftsgrundlage beim verwaltungsrechtlichen Vertrag" (1997) 112 *DVBl* 865
- Löwer W "Der Staat als Wirtschaftssubjekt und Auftraggeber" (2001) 60 *VVDStRL* 416
- Lubbe G "Bona Fides, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontraktereg" (1990) 1 *Stell LR* 7
- Lubbe G "Taking Fundamental Rights Seriously: The Bill of Rights and Its Implications for the Development of Contract Law" (2004) 121 *SALJ* 395
- Lubbe GF & Murray CM *Farlam & Hathaway Contract* (3rd ed, 1988) Kenwyn
- Mackay of Clashfern, Lord (ed) *Halsbury's Laws of England* (4th ed, 2003) London
- Mandelbrote HJ "The Royal Prerogative in the Union" (1936) 53 *SALJ* 426
- Mann FA "The Theoretical Approach towards the Law Governing Contracts between States and Private Persons" (1975) 11 *Revue Belge de Droit International* 562
- Martin P "Comments on the Decision of the French Cour De Cassation, First Civil Division of December 17, 1996 Concerning the Definition of Administrative Contracts" (1997) 6 *Public Procurement LR* CS166
- Martin P "France: The Distinction between Public Procurement and Public Service Delegation Contracts: The Ruling of the Conseil d'Etat of April 15, 1996" (1997) 6 *Public Procurement LR* CS12
- Mathieson "Does the Crown have Human Powers?" (1992) 15 *New Zealand Universities LR* 117
- Maurer H "Der Verwaltungsvertrag - Probleme und Möglichkeiten" (1989) 104 *DVBl* 798
- McLean J (ed) *Property and the Constitution* (1999) Oxford
- McLennan G, Held D & Hall S (eds) *The Idea of the Modern State* (1984) Milton Keynes



- Mewett AW "The Theory of Government Contracts" (1959) 5 *McGill LJ* 222
- Meyers EM "Verjaring tegen de Overheid" (1946) 9 *THRHR* 3
- Miceli TJ *The Economic Approach to Law* (2004) Stanford
- Ministry of Finance *Policy Strategy to Guide Uniformity in Procurement Reform Processes in Government* 2003 (www.gov.za, 14 November 2006)
- Ministry of Finance & Ministry of Public Works *Green Paper on Public Sector Procurement Reform in South Africa* (GG 17928, 14 April 1997)
- Minow M *Making All the Difference* (1990) Ithaca & London
- Mitchell JDB "A General Theory of Public Contracts" (1951) 63 *Juridical Review* 60
- Mitchell JDB "The Treatment of Public Contracts in the United States" (1952) 9 *University of Toronto LJ* 194
- Mitchell JDB *The Contracts of Public Authorities: A Comparative Study* (1954) London
- Mitchell JDB "The Causes and Effects of the Absence of a System of Public Law in the United Kingdom" 1965 *Public Law* 95
- Moorthy VK "The Malaysian National Oil Corporation - Is It a Government Instrumentality?" (1981) 30 *International and Comparative Law Quarterly* 638
- Mueller DC *Public Choice III* (2003) Cambridge
- Mureinik E "Natural Justice for Students: The Case of the Undisciplined Contract" (1985) 1 *SAJHR* 48
- Mureinik E "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31
- Naudé T *The Legal Nature of Preference Contracts* (2003) dissertation University of Stellenbosch
- Naudé T & Lubbe G "Exemption Clauses — a Rethink Occasioned by Afrox Healthcare Bpk v Strydom" (2005) 122 *SALJ* 441
- Nedelsky J "Reconceiving Rights as Relationship" (1993) 1 *Review of Constitutional Studies* 1
- Neethling J & Potgieter JM "Persoonlikheidsregte van 'n Regspersoon" (1991) 54 *THRHR* 120
- Neethling J, Potgieter JM & PJ Visser *Deliktereg* (4th ed, 2002) Durban

- Neumann V "Dogmatische und prinzipiengeleitete Argumente bei der Abgrenzung von Verwaltungsverträgen" (1992) 45 *DÖV* 154
- Nicholas B *The French Law of Contract* (2nd ed, 1992) Oxford
- O'Byrne SK "Public Power and Private Obligation: an Analysis of the Government Contract" (1992) 14 *Dalhousie LJ* 485
- Oliver D "Is the Ultra Vires Rule the Basis of Judicial Review?" 1987 *Public Law* 543
- Oliver D "Judicial Review and the Shorthandwriters" 1993 *Public Law* 214
- Oliver D "Common Values in Public and Private Law and the Public Private Divide" 1997 *Public Law* 630
- Oliver D "The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act" 2000 *Public Law* 476
- Olivier M "Labour Relations Legislation for the Public Service: An International and Comparative Perspective" (1993) 14 *ILJ* 1371
- Olivier MP "Public Sector Employment Law: Recent Case Law Developments in South Africa" (1994) 9 *SAPR/PL* 50
- Olivier PJJ *Die Grondslag van Kontraktuele Gebondenheid* (2004) dissertation University of Stellenbosch
- Pakuscher EK "Judicial Review of Executive Acts in Economic Affairs in Germany" (1971) 20 *Journal of Public Law* 273
- Pannick D "Who is Subject to Judicial Review and in Respect of What?" 1992 *Public Law* 1
- Parker C *et al* (eds) *Regulating Law* (2004) Oxford
- Pfaff R & Schneider H "The Promotion of Administrative Justice Act from a German Perspective" (2001) 17 *SAJHR* 59
- Phang A "Tenders and Uncertainty" (1991) 4 *Journal of Contract Law* 46
- Pillay A "Reviewing Reasonableness: An Appropriate Standard for Evaluating State Action and Inaction?" (2005) 122 *SALJ* 419
- Plasket C "Rattling the Chains of Sibanyoni's Ghost: Contract and Natural Justice Revisited in the Ciskei High Court" (1999) 20 *ILJ* 2228
- Plasket C *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* (2002) dissertation Rhodes University

- Plasket C "Post-1994 Administrative Law in South Africa: The Constitution, The Promotion of Administrative Justice Act 3 of 2000 and the Common Law" paper read at a conference entitled Law and Transformative Justice in Post Apartheid South Africa hosted by the Nelson R Mandela School of Law, University of Fort Hare, 4 - 6 October 2006
- Posner RA "The Economic Approach to Law" (1975) 53 *Texas LR* 757
- Posner RA "Utilitarianism, Economics, and Legal Theory" (1979) 8 *Journal of Legal Studies* 103
- Posner RA & Parisi F (eds) *The Economic Structure of the Law: The Collected Economic Essays of Richard A Posner Volume One* (2000) Cheltenham & Northampton
- Pretorius C-J "Uitbreiding van die Toepassingsgebied van die *Condictio Indebiti* en die Ontwikkeling van 'n Algemene Verrykingsaksie" (1995) 58 *THRHR* 331
- Pretorius DM "The Outsider and Natural Justice: A Re-examination of the Scope of Application of the *Audi Alteram Partem* Principle" (2000) 63 *THRHR* 93
- Pretorius DM "The Defence of the Realm: Contract and Natural Justice" (2002) 119 *SALJ* 374
- Quinot G "The Developing Doctrine of Substantive Protection of Legitimate Expectations in South African Administrative Law" (2004) 19 *SAPR/PL* 543
- Rabie PJ *The Law of Estoppel in South Africa* (1992) Durban
- Rabie PJ & Sonnekus JC *The Law of Estoppel in South Africa* (2nd ed, 2000) Durban
- Rachlinski JJ & Farina CR "Cognitive Psychology and Optimal Government Design" (2002) 87 *Cornell LR* 549
- Rautenbach IM & Malherbe EFJ *Constitutional Law* (4th ed, 2004) Durban
- Reicherzer M "Reform des öffentlich-rechtlichen Vertrags" (2004) 37 *ZRP* 112
- Reicherzer M "Die gesetzliche Verankerung von Public-Private-Partnerships" (2005) 58 *DÖV* 603
- Reimer F "Mehrseitige Verwaltungsverträge" (2003) 94 *VerwArch* 543
- Ress G "Government and Industry in the Federal Republic of Germany" (1980) 29 *International and Comparative Law Quarterly* 87

- Richards P *Law of Contract* (7th ed, 2006) Harlow
- Röhl HC "Verwaltung und Privatrecht - Verwaltungsprivatrecht?" (1995) 86 *VerwArch* 531
- Rose Innes LA *Judicial Review of Administrative Tribunals in South Africa* (1963) Cape Town
- Rose-Ackerman S "Progressive Law and Economics - And the New Administrative Law" (1988) 98 *Yale LJ* 341
- Ross JJ "Die Uitoefening van Kontrole oor die Uitvoerende Mag in die Staat" (1957) 20 *THRHR* 1
- Ruthig J & Storr S *Öffentliches Wirtschaftsrecht* (2005) Heidelberg
- Sarat A & Kearns TR (eds) *Legal Rights* (1997) Ann Arbor
- Saunders C & Yam K "Government Regulation by Contract: Implications for the Rule of Law" (2004) 15 *Public LR* 51
- Sawer G "Shield of the Crown Revisited" (1957) 1 *Melbourne University LR* 137
- Scherzberg A "Zur Einarbeitung und Wiederholung" (1992) 32 *JuS* 205
- Schilling T "Der 'unfreiwillige' Vertrag mit der öffentlichen Hand" (1996) 87 *VerwArch* 191
- Schmitz H " 'Die Verträge sollen sicherer werden' - Zur Novellierung der Vorschriften über den öffentlich-rechtlichen Vertrag" (2005) 120 *DVBl* 17
- Schnapp FE "Öffentliche Verwaltung und privatrechtliche Handlungsformen" (1990) 43 *DÖV* 826
- Schwartz B *French Administrative Law and the Common Law World* (1954) New York
- Schwarze J *European Administrative Law* (1992) London
- Seddon N "The Interaction of Contract and the Executive Power" (2003) 31 *Federal Law Review* 541
- Seddon N *Government Contracts* (3rd ed, 2004) Sydney
- Seidl-Hohenveldern I "The Theory of Quasi-International and Partly International Agreements" (1975) 11 *Revue Belge de Droit International* 567
- Singer JW "The Player and the Cards: Nihilism and Legal Theory" (1984) 94 *Yale LJ* 1
- Singer JW *Entitlement* (2000) New Haven & London

- Singh MP *German Administrative Law in Common Law Perspective* (2nd ed, 2001) Berlin
- Soanes C & Stevenson A (eds) *The Oxford English Dictionary* (2nd ed, 2003) Oxford
- Sonnekus JC "Enkele Opmerkings na Aanleiding van die Aanspraak op Bona Vacantia as Sogenaamde Regale Reg" 1985 *TSAR* 121
- Sonnekus JC "Algemene Vordering Gebaseer op Ongeregverdigde Verryking in Heroorweging" (1992) 55 *THRHR* 301
- Sonnekus JC "Estoppel Uiteindelik 'n Gepaste Billikheidsverweer teen Onsorgvuldige Publiekregtelike Organe" (2003) 66 *THRHR* 684
- Sonnekus JC "Estoppel Uiteindelik 'n Gepaste Billikheidsverweer teen Onsorgvuldige Publiekregtelike Organe (II)" (2004) 67 *THRHR* 171
- South African Law Commission *Final Report Project 47, Unreasonable Stipulations in Contracts and the Rectification of Contracts* (1998)
- Spannowsky W *Grenzen des Verwaltungshandelns durch Verträge und Absprachen* (1994) Berlin
- Stats SA *General Household Survey* (2005)
- Stats SA *Labour Force Survey* (2006)
- Stelkens U *Verwaltungsprivatrecht* (2005) Berlin
- Steyn CSJ *Prerogatief en Diskresie by die Uitvoerende Gesag in die Republiek van Suid-Afrika* (1970) dissertation University of the Orange Free State
- Steyn LC *Die Aanspreeklikheid van die Staat vir die Onregmatige Dade van sy Dienare* (1927) dissertation University of Stellenbosch
- Steyn LC *Die Uitleg van Wette* (5th ed, 1981) Kenwyn
- Storr S *Der Staat als Unternehmer* (2001) Tübingen
- Strauss SA *Huldigingsbundel vir WA Joubert* (1988) Durban
- Summers RS (ed) *American Legal Theory* (1992) Aldershot
- Sunkin M & Payne S (eds) *The Nature of the Crown* (1999) Oxford
- Sutherland P "Breach of Preceding Contracts by the Covenantor and Restraints of Trade: England, Scotland and South Africa" 2000 *TSAR* 675
- Tager L "General Principles of Contract" 1988 *Annual Survey of South African Law* 105

- Taggart M "Reinventing Government, Traffic Lights and the Convergence of Public and Private Power. Review of Harlow and Rawlings *Law and Administration*" 1999 *Public Law* 124
- Taggart M (ed) *The Province of Administrative Law* (1997) Oxford
- Teubner G "Substantive and Reflexive Elements in Modern Law" (1983) 17 *Law and Society Review* 239
- Teubner G (ed) *Dilemmas of Law in the Welfare State* (1988) New York
- Theal GM *History of Africa South of the Zambesi before 1795* (3rd ed, 1922) London
- Thompson LM *The Unification of South Africa* (1960) Oxford
- Tladi DD "Breathing Constitutional Values into the Law of Contract: Freedom of Contract and the Constitution" (2002) 35 *De Jure* 306
- Trubek DM "Where the Action Is: Critical Legal Studies and Empiricism" (1984) 36 *Stanford LR* 575
- Turpin C *Government Procurement and Contracts* (1989) Harlow
- Turpin C *British Government and the Constitution Text, Cases and Materials* (5th ed, 2002) London
- Twining W *Karl Llewellyn and the Realist Movement* (1973) London
- UNAIDS *2006 Report on the Global AIDS Epidemic* (2006)
- Unruh P "Kritik des privatrechtlichen Verwaltungshandelns" (1997) 50 *DÖV* 653
- Van Blerk AE "Critical Legal Studies in South Africa" (1996) 113 *SALJ* 86
- Van Blerk AE *Jurisprudence An Introduction* (1996) Durban
- Van der Merwe S & Lubbe G "Bona Fides and Public Policy in Contract" (1991) 2 *Stell LR* 91
- Van der Merwe S & Van Huyssteen LF "Improperly Obtained Consensus" (1987) 50 *THRHR* 78
- Van der Merwe S, Van Huyssteen LF, Reinecke MFB, Lubbe GF *Contract: General Principles* (2nd ed, 2004) Lansdowne
- Van der Merwe S, Van Huyssteen LF, Reinecke MFB, Lubbe GF *Kontraktereg: Algemene Beginsels* (2nd ed, 2004) Lansdowne
- Van der Merwe SWJ, Lubbe GF & Van Huyssteen LF "The Exceptio Doli Generalis: Requiescat in Pace - Vivat Aequitas" (1989) 106 *SALJ* 235

- Van der Pot CW *Handboek van het Nederlandse Staatsrecht* (11th ed, 1983) Zwolle
- Van der Walt AJ "Dancing with Codes - Protecting, Developing and Deconstructing Property Rights in a Constitutional State" (2001) 118 *SALJ* 258
- Van der Walt AJ "Tentative Urgency: Sensitivity for the Paradoxes of Stability and Change in Social Transformation Decisions of the Constitutional Court" (2001) 16 *SAPR/PL* 1
- Van der Walt AJ "Sosiale Geregtigheid, Prosedurele Billikheid, en Eiendom: Alternatiewe Perspektiewe op Grondwetlike Waarborge (Deel Twee)" (2002) 13 *Stell LR* 206
- Van der Walt AJ "The Public Aspect of Private Property" (2004) 19 *SAPR/PL* 676
- Van der Walt AJ "Transformative Constitutionalism and the Development of South African Property Law (Part 1)" 2005 *TSAR* 655
- Van der Walt AJ "Transformative Constitutionalism and the Development of South African Property Law (Part 2)" 2006 *TSAR* 1
- Van der Walt J & Botha H "Democracy and Rights in South Africa: Beyond a Constitutional Culture of Justification" (2000) 7 *Constellations* 341
- Van Dorsten JL "Uterior Purpose" (1985) 48 *THRHR* 381
- Van Heerden B, Cockrell A & Keightley R (eds) *Boberg's Law of Persons and the Family* (2nd ed, 1999) Kenwyn
- Van Huyssteen LF *Onbehoorlike Beïnvloeding en Misbruik van Omstandighede in die Suid-Afrikaanse Verbintenisreg* (1976) dissertation University of Cape Town
- Van Huyssteen LF & Van der Merwe S "Good Faith in Contract: Proper Behaviour Amidst Changing Circumstances" (1990) 1 *Stell LR* 244
- Van Wyk DH *Persoonlike Status in die Suid-Afrikaanse Publiekreg* (1979) dissertation UNISA
- Van Wyk DH "Privaatreg, Publiekreg en Subjektiewe Regte" (1980) 13 *De Jure* 1
- Van Zyl DH *Geskiedenis van die Romeins Hollandse Reg* (1983) Durban
- Van Zyl DH "Unjustified Enrichment and Restitution: An Awakening Giant Creates Confusion" (1996) 21 *Journal for Juridical Science* 1

- Venter F "Die Staat en die Universiteitswese in Suid-Afrika: Nuwe Wedersydse Grondwetlike Verantwoordelikhede, Regte en Verpligtinge" (1995) 58 *THRHR* 379
- Verloren van Themaat H "Die Historiese Grondslag van die Bevoegdheid van die Unieparlement" (1953) 16 *THRHR* 19
- Verloren van Themaat JP "Die Bronne van ons Staatsreg - Romeins-Hollandse of Engelse Reg?" (1953) 16 *THRHR* 69
- Verloren van Themaat JP "Die Wet op Staatsaanspreeklikheid, No. 20 van 1957" (1957) 20 *THRHR* 245
- Vincent-Jones P "The Regulation of Contractualisation in Quasi-markets for Public Services" 1999 *Public Law* 304
- Visagie GG "Die Regsbedeling aan die Kaap onder die V.O.C." 1963 *Acta Juridica* 118
- Visagie GG *Regspleging en Reg aan die Kaap van 1652 tot 1806* (1964) dissertation University of Cape Town
- Visagie GG *Die Leenreg in Holland* (1974) Cape Town
- Visser D "Die Grondslag van die *Condictio Indebiti*" (1988) 51 *THRHR* 498
- Visser D "Not the General Enrichment Action" 1994 *TSAR* 825
- Visser PJ & Potgieter JM *Estoppel: Cases and Materials* (1994) Durban
- Von Mehren A (ed) *International Encyclopedia of Comparative Law Volume VII Contracts in General* (1999) Tubingen
- Wade HWR & Forsyth CF *Administrative Law* (9th ed, 2004) Oxford
- Wade W "The Crown - Old Platitudes and New Heresies" (1992) 142 *New LJ* 1275, 1315
- Waechter K "Der öffentlich-rechtliche Vertrag" (2006) 61 *JZ* 166
- Walker EA *A History of South Africa* (1928) London
- Wessels JW *The Law of Contract in South Africa* (1937) Johannesburg
- West A et al *The French Legal System* (1998) London
- Wiechers M "Die Regering van die Republiek 'n Regspersoon?" (1964) 27 *THRHR* 161
- Wiechers M "Vonnisbespreking Le Roux v. Minister van Bantoe-Administrasie, 1966 (1) S.A. 481 (A)" (1966) 29 *THRHR* 157
- Wiechers M *Verloren van Themaat Staatsreg* (3rd ed, 1981) Durban
- Wiechers M *Administratiefreg* (2nd ed, 1984) Durban



- Winterton G *Parliament, the Executive and the Governor-General* (1983) Carlton
- Wolff HJ, Bachof O & Stober R *Verwaltungsrecht* (11th ed, 1999) München
- Woolf "Droit Public - English Style" 1995 *Public Law* 57
- Woolf H "Public Law - Private Law: Why the Divide? A Personal View" 1986 *Public Law* 220
- Woolman S et al (eds) *Constitutional Law of South Africa* (2nd ed, 2004) Lansdowne
- Youngs R *English, French & German Comparative Law* (1998) London
- Zieff J "*Culpa in Contrahendo* - a Prescription for the Ills of the South African Law of Contract" (1989) 52 *THRHR* 348
- Ziekow J *Verwaltungsverfahrensgesetz Kommentar* (2006) Stuttgart
- Ziekow J & Siegel T "Entwicklung und Perspektiven des Rechts des öffentlich-rechtlichen Vertrages Teil I" (2003) 94 *VerwArch* 593
- Ziekow J & Siegel T "Entwicklung und Perspektiven des Rechts des öffentlich-rechtlichen Vertrages Teil II" (2004) 95 *VerwArch* 133
- Ziekow J & Siegel T "Entwicklung und Perspektiven des Rechts des öffentlich-rechtlichen Vertrages Teil III" (2004) 95 *VerwArch* 281
- Ziekow J & Siegel T "Entwicklung und Perspektiven des Rechts des öffentlich-rechtlichen Vertrages Teil IV" (2004) 95 *VerwArch* 573
- Ziekow J & Siegel T "Public Public Partnerships und Vergaberecht: Vergaberechtliche Sonderbehandlung der 'In-State-Geschäfte'?" (2005) 96 *VerwArch* 119
- Zimmermann R *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1992) Kenwyn
- Zimmermann R & Visser D (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) Kenwyn
- Zuleeg M "Die Anwendungsbereiche des öffentlichen Rechts und des Privatrechts" (1982) 73 *VerwArch* 384

## TABLE OF CASES

### 1 South Africa

- A - Z Bazaars (Pty) Ltd v Minister of Agriculture 1975 3 SA 468 (A)
- A Becker & Co (Pty) Ltd v Becker and Others 1981 3 SA 406 (A)
- AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another 2007 1 SA 343 (CC)
- ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd 1998 2 SA 109 (W)
- Administrator (Transvaal) Appellant v Industrial & Commercial Timber & Supply Co Ltd Respondent 1932 AD 25
- Administrator, Orange Free State, and Others v Mokopanele and Another 1990 3 SA 780 (A)
- Administrator, Transvaal and Another v Sibiya and Another 1992 4 SA 532 (A)
- Administrator, Transvaal and Others v Zenzile and Others 1991 1 SA 21 (A)
- Administrator, Transvaal, and Others v Theletsane and Others 1991 2 SA 192 (A)
- Administrator, Transvaal, and Others v Traub and Others 1989 4 SA 731 (A)
- Affordable Medicines Trust and Others v Minister of Health and Others 2006 3 SA 247 (CC)
- Afrox Healthcare Bpk v Strydom 2002 6 SA 21 (SCA)
- Airconditioning Design & Development (Pty) Ltd v Minister of Public Works, Gauteng Province 2005 4 SA 103 (T)
- Alberts v Roodepoort-Maraisburg Municipality 1921 TPD 133
- Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 3 SA 506 (A)
- Aliwal North Municipality v Crawford 1964 1 SA 344 (A)
- Ansley & Co and King v Rhodes University College 1923 EDL 403
- Aquafund (Pty) Ltd v Premier of the Province of the Western Cape 1997 7 BCLR 907 (C)
- Aramugan and Other v Johannesburg City Council 1979 1 SA 972 (W)
- Baloro and Others v University of Bophuthatswana and Others 1995 4 SA 197 (B)
- Banco De Mocambique v Inter-Science Research and Development Services (Pty) Ltd 1982 3 SA 330 (T)
- Bank of Lisbon and South Africa Ltd v De Ornelas and Another 1988 3 SA 580 (A)
- Barnard v Barnard 2000 3 SA 741 (C)
- Basson v Chilwan and Others 1993 3 SA 742 (A)

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 4 SA 490 (CC)

Bekker v Administrateur, Oranje-Vrystaat 1993 1 SA 829 (O)

Bel Porto School Governing Body v Premier, Western Cape, and Another 2002 3 SA 265 (CC)

Bell v Van Rensburg NO 1971 3 SA 693 (C)

Benkenstein v Neisius and Others 1997 4 SA 835 (C)

Benoni Town Council v Minister of Agricultural Credit and Land Tenure 1978 1 SA 978 (T)

Benrose Holdings Ltd v Flamingo Laundries and Another 1978 2 SA 377 (W)

Bergl v Colonial Government (1906) 23 SC 112

Bessie & Another v Krugersdorp Municipality 1912 TPD 84

Beyers v Maseke 1912 TPD 567

Binda v The Colonial Government (1887) 5 SC 284

Blackenberg v The Colonial Government (1894) 11 SC 90

Bloemfontein Municipality v Bosrand Quarries (Prop) Ltd 1930 AD 370

Bloemhof Village Council v Calder 1924 TPD 7

Bock and Others v Duburoro Investments (Pty) Ltd 2004 2 SA 242 (SCA)

BOE Bank Bpk v Van Zyl 1999 3 SA 813 (C)

BOE Bank Bpk v Van Zyl 2002 5 SA 165 (C)

Boesak v Minister of Home Affairs and Another 1987 3 SA 665 (C)

Bolandse Eksekuteurskamer Bpk v Dorpsraad van Gouda 1973 1 SA 592 (C)

Botha (now Griessel) and Another v Finanscredit (Pty) Ltd 1989 3 SA 773 (A)

Botha v Coopers & Lybrand 2002 5 SA 347 (SCA)

Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd 1997 2 SA 35 (A)

Brink v Humphries & Jewell (Pty) Ltd 2005 2 SA 419 (SCA)

Brisley v Drotsky 2002 4 SA 1 (SCA)

Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere 1999 3 SA 389 (SCA)

Bull, Sons, & Co v The Colonial Government (1888-1889) 6 SC 283

Bullen v The Colonial Government (1893) 14 NLR 113

Bullock NO v Provincial Government, North West Province 2004 5 SA 262 (SCA)

Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom 2003 5 SA 180 (SCA)

Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC 2001 3 SA 1013 (SCA)

Cape Town Municipality v Nannucci Ltd 1978 2 SA 280 (C)  
 Carephone (Pty) Ltd v Marcus NO and Others 1999 3 SA 304 (LAC)  
 Carr v Jockey Club of South Africa 1976 2 SA 717 (W)  
 Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others 1999 1 SA 324 (CKH)  
 Cave's Imperial Brewery v The Cape Government Railways (1885-1906) 2 Buch AC 151  
 CGEE Alstom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd 1987 1 SA 81 (A)  
 Choice Decisions v MEC, Department of Development, Planning and Local Government, Gauteng, and Another (No 1) 2003 6 SA 280 (W)  
 City Council of Johannesburg v Ferreira Estate Company Limited 1939 WLD 256  
 City of Cape Town v Claremont Union College 1934 AD 414  
 City of Cape Town v Union Government 1940 CPD 188  
 City of Johannesburg v Rand Properties (Pty) Ltd 2007 SCA 25 (RSA)  
 City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd 2007 SCA 28 (RSA)  
 Claase v Transnet Bpk en 'n Ander 1999 3 SA 1012 (T)  
 Claude Neon Ltd v Germiston City Council and Another 1995 3 SA 710 (W)  
 Clifton v Treasurer of The Colony (1892-1893) 10 SC 251  
 Cohen v Verwoerdburg Town Council 1983 1 SA 334 (A)  
 Colonial Government v Barkly West Bridge Co, Ltd (1908) 25 SC 124  
 Colonial Government v Edenborough and Another (1885-1886) 4 SC 290  
 Colonial Government v Van Heerden (1910) 27 SC 248  
 Colonial Treasurer v Johannes Jacobus Coetzer 1872 NLR 40  
 Commercial Area Industrial Forum and Another v North East Rand Transitional Metropolitan Council and Another 1997 3 SA 1075 (T)  
 Commissioner for Customs and Excise v Capital Meats CC (In Liquidation) and Another 1999 1 SA 570 (SCA)  
 Commissioner, South African Police Service, and Others v Maimela and Another 2003 5 SA 480 (T)  
 Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another 2005 6 SA 1 (SCA)  
 Consolidated Diamond Mines of SWA Ltd v Administrator SWA 1958 4 SA 572 (A)  
 Coolcat Restaurante BK h/a Die Kafeteria, UOVS v Vrystaatse Regering en Andere 1999 2 SA 635 (O)

Coronation Freehold Estates, Town & Mines Ltd v Balfour Municipality 1966 3 SA 724 (T)

Crookes v Watson 1956 1 SA 277 (A)

CTP Ltd and Others v Argus Holdings Ltd and Another 1995 4 SA 774 (A)

Cullinan Properties Ltd v Tvl Board for the Development of Peri-Urban Areas 1978 1 SA 282 (T)

Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange 1983 3 SA 344 (W)

De Beer v Keyser and Others 2002 1 SA 827 (SCA)

De la Rouviere v SA Medical and Dental Council 1977 1 SA 85 (N)

De Lange v Smuts NO and Others 1998 3 SA 785 (CC)

De Vroeg en 'n Ander v Stadsraad van Randburg 1970 2 SA 132 (T)

Delfs v Kuehne & Nagel (Pty) Ltd 1990 1 SA 822 (A)

Die Regering van die RSA v SANTAM Versekeringsmpy Bpk 1964 1 SA 546 (W)

Die Spoorbond v South African Railways; Van Heerden v South African Railways 1946 AD 999

Diedericks v Minister of Lands 1964 1 SA 49 (N)

Dilokong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Departement van Handel en Nywerheid 1992 4 SA 1 (A)

Directory Advertising Cost Cutters (Pty) Ltd v Minister for Post, Telecommunications and Broadcasting and Others 1996 3 SA 800 (T)

Dominion Earthworks (Pty) Ltd v State Tender Board and Another 1968 4 SA 151 (T)

Donelly v Barclays National Bank Ltd 1990 1 SA 375 (W)

Du Bois v Stompdrift-Kamanassie Besproeiingsraad 2002 5 SA 186 (C)

Dunn v Minister of Defence and Others 2006 2 SA 107 (T)

Dunywa v East London Urban Bantu School Board and Another 1967 2 SA 410 (E)

Durban's Water Wonderland (Pty) Ltd v Botha and Another 1999 1 SA 982 (SCA)

East London Municipality Appellant v Legate Respondent 1915 AD 313

Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd 2001 4 SA 142 (SCA)

Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd 2001 4 SA 661 (W)

Edward London v The Hon D Erskine, Colonial Secretary, and as such Representing The Government of Natal (1867-1868) NLR 223

Elsworth v Jockey Club of South Africa 1961 4 SA 142 (W)

Embling v Headmaster, St Andrew's College (Grahamstown), and Another 1991 4 SA 458 (E)

Esack NO and Another v Commission on Gender Equality 2001 1 SA 1299 (W)  
 Estate Baker and Others v Estate Baker and Others (1908) 25 SC 234  
 Estate Breet v Peri-Urban Areas Health Board 1955 3 SA 534 (T)  
 Ex parte Coetzee et Uxor 1984 2 SA 363 (W)  
 Ex parte Leeuw (1905) 22 SC 340  
 Ex Parte Minister of Justice: In Re Nedbank Ltd v Abstein Distributors (Pty) Ltd and Others  
 and Donnelly v Barclays National Bank Ltd 1995 3 SA 1 (A)  
 Ex parte Minister of Safety and Security and Others: In re S v Walters and Another 2002 4  
 SA 613 (CC)  
 Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd 1999 2 SA 719 (SCA).  
 Fanapi v East Cape Administration Board 1983 2 SA 688 (E)  
 Faure v The Colonial Secretary 1880 Foord 82  
 Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan  
 Council and Others 1999 1 SA 374 (CC)  
 Fellner v Minister of the Interior 1954 4 SA 523 (A)  
 First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue  
 Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance  
 2002 4 SA 768 (CC)  
 First National Bank of Southern Africa Ltd v Perry NO and Others 2001 3 SA 960 (SCA)  
 Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and  
 Tourism: Branch Marine and Coastal Management and Others 2006 2 SA 199 (C)  
 Fose v Minister of Safety and Security 1997 3 SA 786 (CC)  
 G & L Builders CC v McCarthy Contractors (Pty) Ltd and Another 1988 2 SA 243 (SE)  
 Garment Workers' Union v Schoeman, NO and Others 1949 2 SA 455 (A)  
 George Municipality v Freysen NO 1976 2 SA 945 (A)  
 Gerber and Others v Member of the Executive Council for Development Planning and  
 Local Government, Gauteng, and Another 2003 2 SA 344 (SCA)  
 GNH Office Automation CC and Another v Provincial Tender Board and Others 1996 9  
 BCLR 1144 (Tk)  
 GNH Office Automation CC and Another v Provincial Tender Board, Eastern Cape and  
 Another 1998 3 SA 45 (SCA)  
 Goodman Bros (Pty) Ltd v Transnet Ltd 1998 4 SA 989 (W)  
 Governing Body, Mikro Primary School, and Another v Minister of Education, Western  
 Cape, and Others 2005 3 SA 504 (C)

Government of the Province of the Eastern Cape v Frontier Safaris (Pty) Ltd 1998 2 SA 19 (SCA)

Government of the Republic of South Africa and Another v Government of KwaZulu and Another 1983 1 SA 164 (A)

Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd 1978 2 SA 794 (A)

Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others 2004 3 All SA 446 (C)

Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others 2005 6 SA 313 (SCA)

Gründling v Beyers and Others 1967 2 SA 131(W)

Gui-Os and Others v School Principal, Cornelius Goreseb High School, Khorixas, and Others 1990 3 SA 536 (SWA)

Hare's Brickfields Ltd v Cape Town City Council 1985 1 SA 769 (C)

Herholdt v Municipality of De Aar and Others 1950 3 SA 489 (A)

Hills v Colonial Government (1885-1906) 2 Buch AC 355

Hills v Colonial Government (1904) 21 SC 59

Hoisain v Town Clerk, Wynberg 1916 AD 236

Holland v Commissioner of Crown Lands and Public Works (1877) 7 Buch 105

Honono v Willowvale Bantu School Board and Another 1961 4 SA 408 (A)

Hopf v Pretoria City Council 1947 2 SA 752 (T)

Hornby v Municipality of Roodepoort - Maraisburg and Arthur 1918 AD 278

Houlder Bros v Colonial Government (1906-1909) 3 Buch AC 29

Hurwitz v Colonial Government & Others (1909) 26 SC 217

Independent Electoral Commission v Langeberg Municipality 2001 3 SA 925 (CC)

Independent Municipal and Allied Trade Union and Others v MEC: Environmental Affairs, Developmental Social Welfare and Health, Northern Cape Province, and Others 1999 4 SA 267 (NC)

Inglesby v The Colonial Government (1876) 6 Buch 125

Inkatha Freedom Party and Another v Truth and Reconciliation Commission and Others 2000 3 SA 119 (C)

Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique 1980 2 SA 111 (T)

Ismail v Durban City Council 1973 2 SA 362 (N)

Ixopo Irrigation Board v Land and Agricultural Bank of South Africa 1991 3 SA 233 (N)  
 James D Logan & Co v The Colonial Government (1901) 18 SC 60  
 Janse van Rensburg NO and Another v Minister of Trade and Industry and Another NNO  
 2001 1 SA 29 (CC)  
 Joel Melamed & Hurwitz v Cleveland Estates (Pty) Ltd; Melamed & Hurwitz v Vorner  
 Investments (Pty) Ltd 1984 3 SA 155 (A)  
 Johannesburg Municipal Pension Fund and Others v City of Johannesburg and Others  
 2005 6 SA 273 (W)  
 Johannesburg Municipality v Cohen's Trustees 1909 TS 811  
 Johannesburg Municipality v Davis 1925 AD 395  
 John Wilkinson and Partners (Pty) Ltd v Berea Nursing Home (Pty) Ltd (In Voluntary  
 Liquidation) 1966 1 SA 791 (D)  
 Johns v Colonial Government (1898) 15 SC 245  
 Jones & Co v CIR 1926 CPD 1  
 Jones v Town Council of Cape Town (1895) 12 SC 19  
 K & P Contractors v Standerton Town Council and Another 1963 1 SA 405 (T)  
 Kadwa v Colonial Government (1905) 26 NLR 62  
 Kaffraria Property v Government of the Republic of Zambia 1980 2 SA 709 (E)  
 Kempton Park/Tembisa Metropolitan Substructure v Kelder 2000 2 SA 980 (SCA)  
 Khaile v Administration Board Western Cape 1983 1 SA 473 (K)  
 KJ International and Others v MV Oscar Jupiter (Compania De Navigatie Maritime  
 'Romline' SA and Others Intervening) 1998 2 SA 130 (D)  
 Knut Allard v Colonial Government (1907) 28 NLR 422  
 Kommissaris van Binnelandse Inkomste v Willers 1994 3 SA 283 (A)  
 Korf v Health Professions Council of South Africa 2000 1 SA 1171 (T)  
 Kudu Granite Operations (Pty) Ltd v Caterna Ltd 2003 5 SA 193 (SCA)  
 Lamprecht v McNeillie 1994 3 SA 665 (A)  
 Land and Agricultural Bank of SA v Sentraal Westelike Koöperatiewe Maatskappy Bpk en  
 Andere 1979 2 SA 346 (N)  
 Langenhorst v Administrator of Transvaal 1927 TPD 503  
 Langeni and Others v Minister of Health and Welfare and Others 1988 4 SA 93 (W)  
 Latsky v Surveyor-General (1877) 7 Buch 68  
 Law Union and Rock Insurance Co Ltd v Carmichael's Executor 1917 AD 593  
 Le Roux v Minister van Bantoe-Administrasie en Ontwikkeling 1966 1 SA 481 (A)



Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust and Another 1999 4 SA 375 (T)  
 Lebowa Mineral Trust v Lebowa Granite (Pty) Ltd 2002 3 SA 30 (T)  
 Lendlease Finance Co (Pty) Ltd v Corporacion De Mercadeo Agricola and Others 1975 4  
 SA 397 (CPD)  
 Leyds NO v Simon and Others 1964 1 SA 377 (T)  
 Logan v Colonial Government (1892-1893) 10 SC 123  
 Logbro Properties CC v Bedderson NO 2003 2 SA 460 (SCA)  
 Lubbe v The Colonial Government (1885-1906) 2 Buch AC 269  
 Lunt v University of Cape Town 1989 2 SA 438 (C)  
 Magna Alloys and Research SA (Pty) Ltd v Ellis 1984 4 SA 874 (A)  
 Malan v Cape Town and Wellington Railway Company (1861-1863) 4 Searle 81  
 Malilang and Others v MV Houda Pearl 1986 2 SA 714 (A)  
 Marais v Democratic Alliance 2002 2 BCLR 171 (C)  
 Mark Hutchinson v Charles Palmer, in His Capacity as Her Majesty's Deputy Commissary  
 General for the Colony of Natal, and as Such Representing Her Majesty's  
 Commissariat Department (1879-1880) 1 NLR 23  
 Masetlha v President of the Republic of South Africa and Another 2007 JOL 19069 (T)  
 Mateis v Ngwathe Plaaslike Munisipaliteit en Andere 2003 4 SA 361 (SCA)  
 Mayekiso v Minister of Health and Welfare and Others 1988 9 ILJ 227 (W)  
 Mccarthy Retail Ltd v Shortdistance Carriers CC 2001 3 SA 482 (SCA)  
 Mcilrath v Pretoria Municipality 1912 TPD 1027  
 Medscheme Holdings (Pty) Ltd and Another v Bhamjee 2005 5 SA 339 (SCA)  
 Methven v The Colonial Government (1896) 17 NLR 12  
 Methven v The Colonial Government (1896) 17 NLR 31  
 Metro Inspection Services (Western Cape) CC and Others v Cape Metropolitan Council  
 1999 4 SA 1184 (C)  
 Metro Projects CC and Another v Klerksdorp Local Municipality and Others 2004 1 SA 16  
 (SCA)  
 Mgoqi v City of Cape Town and Another; City of Cape Town v Mgoqi and Another 2006 4  
 SA 355 (C)  
 Minister of Correctional Services and Others v Kwakwa and Another 2002 4 SA 455 (SCA)  
 Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary  
 School, and Another 2006 1 SA 1 (SCA)

Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others  
 (Treatment Action Campaign and Another as Amici Curiae) 2006 2 SA 311 (CC)

Minister of Home Affairs and Others v Watchenuka and Another 2004 4 SA 326 (SCA)

Minister of Home Affairs v American Ninja IV Partnership 1993 1 SA 257 (A)

Minister of Law and Order v Patterson 1984 2 SA 739 (A)

Minister of Mines v Mcclelland 1912 OPD 109

Minister of Public Works and Land Affairs v Group Five Building Ltd 1999 4 SA 12 (SCA)

Minister of Public Works and Others v Kyalami Ridge Environmental Association and  
 Others 2001 3 SA 1151 (CC)

Minister of Railways and Harbours v Johannesburg Municipality 1912 AD 595

Minister of Social Development v Phoenix Cash & Carry 2007 SCA 26 (RSA)

Mistry v Interim National Medical and Dental Council of South Africa 1997 7 BCLR 933 (D)

Mittalsteel South Africa Ltd (formerly Iscor Ltd) v Hlatshwayo 2007 1 SA 66 (SCA)

Mkhize v Rector, University of Zululand 1986 1 SA 901 (D)

Modise and Others v Steve's Spar, Blackheath 2001 2 SA 406 (LAC)

Mohamed and Another v President of the RSA and Others 2001 3 SA 893 (CC)

Mokgoko and Others v Acting Rector, Setlogelo Technikon, and Others 1994 4 SA 104  
 (BG)

Mokoena and Others v Administrator, Transvaal 1988 4 SA 912 (W)

Mokopanele en Andere v Administrateur, Oranje Vrystaat, en Andere 1989 1 SA 434 (O)

Moletsane v Premier of the Free State and Another 1996 2 SA 95 (O)

Monckten v British South African Co 1920 AD 324

Moodley and Others v Minister of Education and Culture, House of Delegates, and  
 Another 1989 3 SA 221 (A)

Mossel Bay Municipality v Ebrahim 1952 1 SA 567 (C)

Mostert v Philipstown Municipality 1912 CPD 1135

Motor Insurers' Association of Southern Africa v Boshoff 1970 1 SA 489 (A)

Motorvoertuigassuransiefonds v Gcwabe 1979 4 SA 986 (A)

Mthembi-Mahanyele v Mail & Guardian Ltd and Another 2004 6 SA 329 (SCA)

Mufamadi and Others v Dorbyl Finance (Pty) Ltd 1996 1 SA 799 (A)

Municipality of Frenchhoek v Hugo (1883) 2 SC 230

Municipality of Green Point v Powell's Trustees (1848) 2 Menzies 398

Murray & Roberts Properties (North) Ltd v Bedfordview Village Council 1983 1 SA 1056  
 (A)

Mustapha and Another v Receiver, Lichtenburgh and Others 1958 3 SA 343 (A)

Myburgh v Danielskuil Munisipaliteit 1985 3 SA 335 (NK)

Naran v Head of Department of Local Government, Housing and Agriculture (House of Delegates) 1993 1 SA 405 (T)

Natal Canvas Rubber Manufacturers Ltd v Minister of Justice and Others 1967 1 SA 640 (D)

National & Overseas Modular Construction (Pty) Ltd v Tender Board, Free State Provincial Government, and Another 1999 1 SA 701 (O)

National and Overseas Distributors Corporation (Pty) Ltd v Potato Board 1958 2 SA 473 (A)

Nchabaleng v Director of Education (Tvl) and Another 1954 1 SA 432 (T)

Ndongeni v Administration Board, Western Cape, and Another 1984 1 SA 768 (C)

Nel v Koppies Munisipaliteit 1967 1 SA 310 (O)

New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang and Another NNO;  
Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO 2005 2 SA 530 (C)

Nextcom (Pty) Ltd v Funde NO and Others 2000 4 SA 491 (T)

Ngwenya v Natalspruit Bantu School Board 1965 1 SA 692 (W)

Nkabinde v Nkabinde and Another 1944 WLD 112

Nortje en 'n Ander v Pool NO 1966 3 SA 96 (A)

Nortje en 'n Ander v Minister van Korrektiewe Dienste en Andere 2001 3 SA 472 (SCA)

Ntshotsho v Umtata Municipality 1998 3 SA 102 (Tk)

Ocean Diners (Pty) Ltd v Golden Hill Construction CC 1993 3 SA 331 (A)

Oertel and Others NNO v Director of A Local Government and Others 1981 2 SA 77 (T)

Oertel and Others NNO v Director of Local Government and Others 1981 4 SA 491 (T)

Oertel en Andere NNO v Direkteur van Plaaslike Bestuur en Andere 1983 1 SA 354 (A)

Olitzki Property Holdings v State Tender Board and Another 2001 3 SA 1247 (SCA)

Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affairs 1989 4 SA 309 (T)

Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affairs 1991 4 SA 718 (A)

Opperman v Uitvoerende Komitee van die Verteenwoordigende Owerheid van die Blankes en Andere 1991 1 SA 372 (SWA)

Paarl Municipality v The Colonial Government (1906) 23 SC 505

Pahad v Director of Food Supplies and Distribution 1949 3 SA 695 (AD)

Palmer v Hutchinson 6 App Cas 619 (1881)

Paltex Dyehouse (Pty) Ltd and Another v Union Spinning Mills (Pty) Ltd 2000 4 SA 837 (BH)

Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd and Others 1993 4 SA 206 (W)

Paola v Jeeva NO and Others 2002 2 SA 391 (D)

Paragon Business Forms (Pty) Ltd v Du Preez 1994 1 SA 434 (SE)

Park Geboubeleggings en Wynkelders Bpk v Stadsraad van Vanderbijlpark 1965 1 SA 849 (T)

Patel v Grobbelaar 1974 1 SA 532 (A)

Pepcor Retirement Fund and Another v Financial Services Board and Another 2003 6 SA 38 (SCA)

Peri-Urban Areas Health Board v Estate Breet 1954 1 SA 451 (T)

Permanent Estate and Finance Co Ltd v Johannesburg City Council 1952 4 SA 249 (W)

Permanent Secretary, Department of Education and Welfare, Eastern Cape, and Another v Ed-U-College (PE) (Section 21) Inc 2001 2 SA 1 (CC)

Peter Gordon Afslaers v Stadsraad van die Munisipaliteit van Kroonstad 1974 1 SA 499 (A)

Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 2 SA 674 (CC)

Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another 2005 3 SA 238 (SCA)

Phillips v The Colonial Government (1907) 24 SC 511

Pietermaritzburg Congregation of Jehovah's Witnesses v Pietermaritzburg City Council 1973 4 SA 306 (N)

Pitch v Union Government (Minister of Justice) 1912 AD 719

Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk 1986 1 SA 819 (A)

Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Other 2006 2 All SA 175 (E)

Port Elizabeth Municipality v Uitenhage Municipality 1971 1 SA 724 (A)

Postmaster-General v Taute 1905 TS 582

Potchefstroom se Stadsraad v Kotze 1960 3 SA 616 (A)

Premier, Free State, and Others v Firechem Free State (Pty) Ltd 2000 4 SA 413 (SCA)

Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal 1999 2 SA 91 (CC)

President of the Republic of South Africa and Another v Hugo 1997 4 SA 1 (CC)

President of the Republic of South Africa v South African Rugby Football Union 2000 1 SA 1 (CC)

Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd 2004 6 SA 66 (SCA)

R v Debele 1956 4 SA 570 (A)

R v Hurwitz 1944 EDL 23

Raad van Beheer oor die Vee- en Vleisnywerheid v Minister van Gesondheid 1961 4 SA 352 (A)

Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others 2005 2 SA 359 (CC)

Rainbow Diamonds (Edms) Bpk v Suid-Afrikaanse Nasionale Lewensassuransiematskappy 1984 3 SA 1 (A)

Ramburan v Minister of Housing (House of Delegates) 1995 1 SA 353 (D)

Rawlins and Another v Caravantruck (Pty) Ltd 1993 1 SA 537 (A)

Reddy v Siemens Telecommunications (Pty) Ltd 2007 2 SA 486 (SCA)

Reed v Port Elizabeth Municipality (1908) 22 EDC 315

Reeves and Another v Marfield Insurance Brokers CC and Another 1996 3 SA 766 (A)

Rogers v Durban Corporation 1950 1 SA 65 (D)

Rossouw v Suid-Afrikaanse Mediese Navorsingsraad 1990 3 SA 297 (C)

Roux v Colonial Government (1901) 18 SC 143

RPM Bricks (Pty) Ltd v City of Tshwane Metropolitan Municipality 2007 JOL 19649 (T)

S v Gqozo and Another 1994 2 SA 756 (CK)

S v Makwanyane and Another 1995 3 SA 391 (CC)

SA Metal Machinery Company Ltd v Transnet Ltd 1999 1 BCLR 58 (W)

SA Post Office Ltd v Chairperson of Western Cape Provincial Tender Board and Others 2001 5 BCLR 500 (C)

SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere 1964 4 SA 760 (A)

Sasfin (Pty) Ltd v Beukes 1989 1 SA 1 (A)

Scholtz v Cape Divisional Council 1987 1 SA 68 (C)

Schoof v Weyer (1885-1887) 5 EDC 33

Schulte v Van der Berg and Others NNO 1991 3 SA 717 (C)

Sebenza Forwarding & Shipping Consultancy (Pty) Ltd v Petroleum Oil and Gas Corporation of SA (Pty) Ltd t/a Petro SA and Another 2006 2 SA 52 (C)

Secretary for Inland Revenue v Kirsch 1978 3 SA 93 (T)

Sedgefield Ratepayers' and Voters' Association and Others v Government of the Republic of South Africa and Others 1989 2 SA 685 (C)

Sibanyoni v University of Fort Hare 1985 1 SA 19 (CkS)

Sibiya and Another v Administrator, Natal and Another 1991 2 SA 591 (D)

Sills v Catherine 1910 EDL 502

Silver Garbus & Co (Pty) Ltd v Teichert 1954 2 SA 98 (N)

Soeker v Colonial Government (1906-1909) 3 Buch AC 207

South African Associated Newspapers Ltd v Estate Pelsner 1975 4 SA 797 (A)

South African Forestry Co Ltd v York Timbers Ltd 2005 3 SA 323 (SCA)

South African Railways and Harbours v Transvaal Consolidated Land and Exploration Co Ltd 1961 2 SA 467 (A)

South African Roads Board v Johannesburg City Council 1991 4 SA 1 (A)

Southern Metropolitan Substructure v Thompson and Others 1997 2 SA 799 (W)

Staatsdiensliga van Suid-Afrika en Andere v Minister van Waterwese 1990 2 SA 440 (NK)

Stadsraad van Pretoria v Van Wyk 1973 2 SA 779 (A)

Stanfield v Minister of Correctional Services and Others 2004 4 SA 43 (C)

Steenkamp NO v Provincial Tender Board, Eastern Cape 2006 3 SA 151 (SCA)

Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 3 SA 121 (CC)

Stellenbosch Divisional Council v Shapiro 1953 3 SA 418 (C)

Stock and Another v Minister of Housing and Others 2007 2 SA 9 (C)

Strydom v Die Land- en Landboubank van Suid-Afrika 1972 1 SA 801 (A)

Sunshine Records (Pty) Ltd v Frohling and Others 1990 4 SA 782 (A)

Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd 1982 1 SA 398 (A)

Tanjan and Others v Chairman, Management Committee, Johannesburg City Council, and Another (2) 1979 1 SA 977 (W)

The Akademik Fyodorov: Government of The Russian Federation and Another v Marine Expeditions Inc 1996 4 SA 422 (C)

The Colonial Government v Smith, Lawrence & Mould, and Others (1885-1886) 4 SC 194

The Colonial Government v Smith's Executors (1889-1890) 7 SC 129

The Government v Thorne and Another NNO 1974 2 SA 1 (A)

Thornicroft v Salisbury Municipality 1951 1 SA 559 (A)

Tony Rahme Marketing Agencies SA (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council 1997 4 SA 213 (W)

Town Council of Cape Town v Commissioner of Crown Lands and Public Works (1880) Foord 21

TPO Meara v The Colonial Government 1869 NLR 16

Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd 2006 4 BCLR 473 (SCA)

Transnet Ltd and Others v Chirwa 2007 2 SA 198 (SCA)

Transnet Ltd v Goodman Brothers (Pty) Ltd 2001 1 SA 853 (SCA)

Transnet Ltd v Sechaba Photoscan (Pty) Ltd 2005 1 SA 299 (SCA)

Transvaal Cold Storage Co, Ltd, v Government 1910 TS 622

Transvaal Property and Investment Co, Ltd, and Ditcher v Pretoria Municipality 1921 TPD 261

Transvaalse Raad vir die Ontwikkeling van Buite-Stedelike Gebiede v Steyn Uitzicht Beleggings (Edms) Bpk 1977 3 SA 351 (T)+B231

Treadwell v Roberts 1913 WLD 54

Treasurer-General v Van Vuren 1905 TPD 582

Trotman and Another v Edwick 1951 1 SA 443 (A)

Truck & Car Company (Pty), Ltd v Matola 1939 TPD 436

Trust Bank of Africa Ltd v Appletime Engineering (Pty) Ltd 1981 1 SA 374 (D)

Trust Bank van Afrika Bpk v Eksteen 1964 3 SA 402 (A)

Tshabalala and Others v Minister of Health and Others 1987 1 SA 513 (W)

Turner v Jockey Club of South Africa 1974 3 SA 633 (A)

Tutu v Minister of Internal Affairs 1982 4 SA 571 (T)

Tyatya v University of Bophuthatswana 1994 2 SA 375 (BG)

Uitenhage Municipality v Colonial Government (1891-1892) 9 SC 375

Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere 1997 2 All SA 548 (SCA)

Union Government (Minister of Lands) v Estate Whittaker 1916 AD 194

Union Government (Minister of Railways and Harbours) v Faux Ltd 1916 AD 105

Upper Kubusie Village Management Board v Nel 1968 2 SA 161 (E)

Van den Berg & Kie Rekenkundige Beampies v Boomprops 1028 BK 1999 1 SA 780 (T)

Van der Westhuizen v Arnold 2002 6 SA 453 (SCA)

Van Huyssteen and Others NNO v Minister of Environmental Affairs and Tourism and Others 1996 1 SA 283 (C)

Van Rooyen and Others v The State and Others 2001 4 SA 396 (T)  
 Van Zyl v New National Party and Others 2003 3 All SA 737 (C)  
 Veerapan and Others v Chairman, Management Committee, Johannesburg City Council,  
 and Other 1979 1 SA 988 (W)  
 Venter and Others v Credit Guarantee Insurance Corporation of Africa Ltd and Another  
 1996 3 SA 966 (A)  
 Vulindlela Furniture Manufacturers (Pty) Ltd v MEC, Department of Education and Culture,  
 Eastern Cape, and Others 1998 4 SA 908 (TK)  
 Vumazonke v MEC for Social Development, Eastern Cape, and Three Similar Cases 2005  
 6 SA 229 (SE)  
 W D Kimber v Colonial Government (1906) 27 NLR 524  
 War Department v Gibson Brothers (1885-1886) 4 SC 83  
 Wed (Pty) Ltd v Pretoria City Council and Others 1988 1 SA 746 (A)  
 Wedge Transport (Pty) Ltd v Cape Divisional Council 1981 4 SA 515 (A)  
 Wells v South African Alumenite Company 1927 AD 69  
 Wentzel v Gemeenskapsontwikkelingsraad en Andere 1981 3 SA 703 (T)  
 Wiggins v Colonial Government (1899) 16 SC 425  
 Wilkins NO v Voges 1994 3 SA 130 (A)  
 Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue 1992 4 SA 202 (A)  
 Winter v South African Railways & Harbours 1929 AD 100  
 Wittmann v Deutscher Schulverein, Pretoria and Others 1998 4 SA 423 (T)  
 Worcester Municipality v The Colonial Government (1890-1891) 8 SC 195  
 WP Koöperatief Bpk v Louw 1995 4 SA 978 (C)  
 Xatula v Minister Of Police, Transkei 1993 4 SA 344 (TK)  
 Zondi v MEC for Traditional and Local Government Affairs and Others 2005 3 SA 589  
 (CC)  
 Zwelibanzi v University of Transkei 1995 1 SA 407 (Tk)

## **2 Canada**

Gerhardy v Brown (1985) 159 CLR 70  
 Reference re Secession of Quebec [1998] 2 SCR 217

## **3 France**

Bertin, *Conseil d'Etat*, 20 April 1956



Blanco, *Tribunal des Conflits*, 8 February 1873

Sieur Valet, *Conseil d'Etat*, 23 October 1973

Terrier, *Conseil d'Etat*, 6 February 1903

#### **4 Germany**

OVG Koblenz, decision of 8.12.2003, (2004) 17 NVwZ-RR 241

#### **5 United Kingdom**

A-G v Guardian Newspapers [1988] 3 All ER 545

Blackpool and Fylde Aero Club v Blackpool Borough Council [1990] 1 WLR 1195

British Broadcasting Corporation v Johns [1965] Ch 32

Calvin's case (1608) 7 Coke's Reports 1; 2 St Tr 559

Campbell v Hall 1774 1 Cowper 204; 98 English Reports 1045; Lofft 655

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374

Credit Suisse v Allerdale Borough Council [1997] QB 306

Credit Suisse v Waltham Forest London Borough Council [1996] 4 All ER 176

Hazell v Hammersmith and Fulham London Borough Council [1991] 1 All ER 545

Jones v Swansea City Council [1989] 3 All ER 162

Jones v Swansea City Council [1990] 3 All ER 737

Kleinwort Benson Ltd v Birmingham City Council [1996] 4 All ER 733

Law v National Greyhound Racing Club [1983] 1 WLR 1302

Lloyds Bank Ltd v Bundy [1974] 3 All ER 757

M v Home Office [1993] 3 All ER 537

Mercury Communications v Director General of Telecommunications [1996] 1 WLR 48

O'Reilly v Mackman [1983] 2 AC 237

R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the  
Commonwealth, ex parte Wachmann [1993] 2 All ER 249

R v Disciplinary Committee of the Jockey Club ex p Aga Khan [1993] 2 All ER 853

R v Legal Aid Board ex p Donn and Co [1996] 3 All ER 1

R v Lloyd's of London ex p Briggs and others [1993] 1 Lloyd's Rep 176

R v Panel on Take-overs and Mergers ex parte Datafin Plc [1987] QB 815

Roy v Kensington & Chelsea Family Practitioner Committee [1992] AC 624

Russell v Duke of Norfolk and Others [1949] 1 All ER 109

Trendtex Trading Corporation v Central Bank of Nigeria [1977] QB 529 (CA)

Westdeutsche Landesbank Girozentrale v Islington London Borough Council; Kleinwort  
Benson Ltd v Sandwell Borough Council [1994] 4 All ER 890

## **6 Zimbabwe**

Barker McCormac (Pvt) Ltd v Government of Kenya 1985 4 SA 197 (ZH)

Murray v McLean NO 1970 1 SA 133 (R)

Robb NO v Standard Bank Ltd and Another 1979 2 SA 420 (R)

S&T Import and Export (Pvt) v Controller of Customs and Excise 1981 4 SA 196 (ZA)

Scottish Rhodesia Finance Ltd v Provincial Magistrate, Umtali, and Others 1971 3 SA 234  
(R)

Waterfalls Town Management Board v Minister of Housing 1957 1 SA 336 (SR)

William Maine & Son (Pty) Ltd v Rhodesia Railways 1976 4 SA 914 (R)

## TABLE OF LEGISLATION

### 1 South Africa

Act 19 of 1900 (C)

Act 2 of 1860 (C)

Alexkor Limited Act 116 of 1992

Cape Act 31 of 1898

Cape Act 35 of 1904

Companies Act 61 of 1973

Constitution of the Republic of South Africa 1996

Constitution of the Republic of South Africa Act 200 of 1993

Crown Lands Act 14 of 1878

Crown Lands Disposal Act 15 of 1887 (C)

Crown Lands Leasing Act 26 of 1891

Crown Liabilities Act 1 of 1910

Crown Liabilities Act 37 of 1888 (C)

Crown Liabilities Ordinance 44 of 1903 (O)

Crown Liabilities Ordinance 51 of 1903 (T)

Crown Suit Act 14 of 1894 (N)

Diamonds Act 56 of 1986

Diplomatic Immunities and Privileges Act 37 of 2001

Electoral Commission Act 51 of 1996

Eskom Conversion Act 13 of 2001

Financial Intelligence Centre Act 38 of 2001

Financial Relations Act 65 of 1976

Foreign States Immunities Act 87 of 1981

Higher Education Act 101 of 1997

Housing Act 4 of 1966

Land Affairs Act 101 of 1987

Legal Succession to The South African Transport Services Act 9 of 1989

Local Government Ordinance 17 of 1939 (T)

Local Government Transition Act 209 of 1993

Management of State Forests Act 128 of 1992

Marine Living Resources Act 18 of 1998

National Environmental Management: Protected Areas Act 57 of 2003  
National Supplies Procurement Act 89 of 1970  
National Water Act 36 of 1998  
Ordinance 3 of 1904 (O)  
Post Office Act 44 of 1958  
Precious Stones Act 73 of 1964  
Prescription Act 18 of 1943  
Prescription Act 68 of 1969  
Public Finance Management Act 1 of 1999  
Public Service Act 111 van 1984  
Rental Housing Act 50 of 1999  
Republic of South Africa Constitution Act 110 of 1983  
Republic of South Africa Constitution Act 32 of 1961  
Road Traffic Corporation Management Act 20 of 1999  
Sea Shore Act 21 of 1935  
South African Foreign States Immunities Act 87 of 1981  
South African Passports and Travel Documents Act 4 of 1994  
State Land Disposal Act 48 of 1961  
State Lands Disposal Act 1 of 1952  
State Tender Board Act 86 of 1968  
Statistics Act 6 of 1999

## **2 France**

Code des Marches Publics 8 Jan 2004  
Constitution of 1958  
Declaration of the Rights of Man of 1789  
Law of 16 – 24 August 1790

## **3 Germany**

Bürgerliches Gesetzbuch 1896  
Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen 1976  
Grundgesetz für die Bundesrepublik Deutschland 1949  
Verwaltungsverfahrensgesetz 1978  
Verwaltungsgerichtsordnung 1960

#### **4 United Kingdom**

Local Government Act 1972

Local Government and Housing Act 1989

Local Government (Contracts) Act 1997